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IN THE

Supreme Court of the United States

OCTOBER TERM, 19____

No. 956

ROBERT B. BENNETT, Acting Warden, Louisiana State Penitentiary,

Petitioner,

versus

EDGAR LABAT and CLIFTON ALTON PORET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinion of the District Court is found on pages 315 - 337 of Volume I of the Transcript of Record and the opinion of the United States Court of Appeals for the Fifth Circuit is found on pages 353-457 of Volume II of the Transcript of Record.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on August 15, 1966, and a copy thereof accompanies this petition in the Transcript of Record, Volume II, pp. 353 - 457. Petitioner's petition for rehearing was denied on September 30, 1966, and a copy of that order accompanies this petition in the Transcript of Record, Volume II, p. 484. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Should the rule applicable heretofore only to federal jury cases, that any accused has standing without a showing of prejudice to complain of the exclusion from the grand or petit jury of a class of which he is not a member, be applied to reverse the conviction of the defendants in state court?

II. Should the Fifth Circuit Court of Appeals have assumed without proof that manual laborers, outside workers, artisans, and daily wage earners are an identifiable class subject to prejudicial treatment from the rest of the community, and that their exclusion from jury service would deprive the defendants, who were not manual laborers, etc., of due process?

III. Is the liberal granting of excuses from jury service at their request, to persons who would suffer financial hardship by reason of jury service, equivalent to the exclusion of an economic class; and if so, did such a procedure in and of itself deny a fair trial to defendants who were not members of such a class?

IV. When more Negroes than Whites were at the time of defendants' indictment and trial ineligible for or excused from jury duty because of educational and economic factors not related to a planned system of discrimination, were the jury commissioners constitutionally required to seek out additional Negroes to compensate for those eliminated by virtue of non-discriminatory factors, and did their failure to do so deprive defendants of due process?

V. Should the new and more stringent standards con-

cerning jury selection announced by the Fifth Circuit Court of Appeals in the instant case, and applied to nullify defendants' indictments and convictions in post conviction proceedings, be applied retroactively in state court convictions which were final before the rules were announced; or should such new standards be applied prospectively only?

VI. Did the Fifth Circuit Court of Appeals have the power to reverse the decision of the United States Supreme Court in *Michel v. La.*, 350 U.S. 91?

VII. Did the Fifth Circuit Court of Appeals violate Rule 52(a) of the Federal Rules of Civil Procedure by setting aside findings of fact by the district judge in the absence of clearly erroneous findings?

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES AND RULES INVOLVED

Rule 52 of the Rules of Civil Procedure for the United States District Courts.

"Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b)."

Amendment XIV, Section 1 of the Constitution of the United States.

"AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOR-

TIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction "thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioners were charged with having committed rape on a woman in New Orleans, Louisiana, on November 12, 1950. In the early hours of the morning of November 12, 1950, while the prosecuting witness and her escort were walking along a New Orleans street, they were assaulted by the two defendants. Mr. Penedo, the lady's escort, was robbed at gun point, and his lady companion, the prosecuting witness, was raped by the defendants after having her clothes completely torn from her body. Defendant, Labat, was arrested shortly afterwards, but Poret, who fled, and thus became a fugitive from justice, was not found until almost two years later when he was located in a Tennessee penitentiary, serving time under a Tennessee conviction for another crime. After all pre-trial motions and other proceedings were exhausted, the defendants were tried by a jury, convicted, and on May 23, 1953, the death sentence was imposed pursuant to Louisiana law. During the trial, a total of thirty-four bills of exception were reserved on behalf of the defendants, and appeals were subsequently perfected based upon these exceptions. One bill of exception was directed at an allegation that members of defendants' race (Negro) had been systematically excluded from the grand jury which had indicted these defendants. The Supreme Court of Louisiana heard the appeals, and on July 2, 1954, after a thorough and exhaustive review of and inquiry into all thirty-four alleged errors, affirmed the convictions and sentences. *State of Louisiana v. Edgar Labat and Clifton Alton Poret*, 75 So. (2d) 333, 226 La. 201. Rehearing was denied by the Louisiana Supreme Court on October 5, 1954. Applications for writs of certiorari were applied for and the United States Supreme Court granted the

writs, 348 U. S. 950, 75 S. Ct. 444 (1955), and after hearing the case, affirmed the convictions and sentences. *Michel v. State of Louisiana* and *Clifton Poret and Edgar Labat v. State of Louisiana*, 350 U. S. 91, 76 S. Ct. 158 (1955), rehearing denied, 350 U. S. 955, 76 S. Ct. 340 (1956). Of the many alleged errors presented, the only question then considered by the United States Supreme Court to be serious was the question raised concerning the composition of the grand jury which had indicted petitioners. The United States Supreme Court finally rejected petitioners' plea on the ground that they, petitioners, had failed to timely object to the composition of the jury as required by State law even though they had ample opportunity to have done so.

Thereafter, on September 18, 1957, petitioners filed an application for the issuance of a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana, based upon an allegation that they had been convicted on coerced and fradulently obtained evidence. This application was rejected on September 19, 1957, for the reason that petitioners had not exhausted available State remedies in that this contention had never been presented to any Court of the State of Louisiana, and that thus, the Federal District Court was without jurisdiction. A further stay of execution was then granted by the United States Fifth Circuit Court of Appeals to allow petitioners time to exhaust available State remedies. Application for habeas corpus was then made by petitioners to the State Court, and on September 25, 1957, the Louisiana Supreme Court denied the writ of habeas corpus, and on the same day, denied a writ of error Coram Nobis. Despite the fact that petitioners' claim that they had been convicted on coerced testimony had been

thoroughly reviewed and rejected by the highest court of the State of Louisiana, and despite the fact that the United States Supreme Court refused to review that decision, it, the United States Supreme Court, did, on November 18, 1957, remand the case to this Court for consideration of petitioners' previously filed application for habeas corpus, which application was based upon the very same contention that had been rejected by the Louisiana Supreme Court, and whose decision the United States Supreme Court had refused to review. Pursuant to this remand, the United States District Court for the Eastern District of Louisiana, Honorable J. Skelley Wright presiding, brought this matter on for hearing on February 6, 1958. Not only were petitioners heard on the question of coerced testimony, but they were, for all practical purposes, completely tried anew. Some twenty-five witnesses were heard and after a thorough analysis of the testimony, Judge Wright denied petitioners' application for habeas corpus. *Labat v. Sigler*, 162 F. Supp. 574. Motions for a new trial and for rehearing were denied, and an appeal lodged with the United States Court of Appeals, Fifth Circuit, which Court, in *Labat v. Sigler*, 267 F. (2d) 307 (CA 5 1959), affirmed the holding of the District Court. Petitioners then applied to the United States Supreme Court for writs of certiorari, which writs were granted, and the case again remanded to this Court "for disposition of the question whether members of petitioners' race were deliberately and intentionally limited, and excluded in selection of petit jury panels, in violation of the Federal Constitution." Following the order of remand, several pre-trial conferences were held and various new motions filed, heard, and disposed of, and finally on March 31, 1964, this matter came on for another full evidentiary hearing on the question presented to the District Court

by the United States Supreme Court, i.e., whether or not petitioners' constitutional rights have been violated by a systematic exclusion or a systematic token inclusion of members of the Negro race from the petit jury which tried these petitioners. Following this latest hearing before the Court, during which six witnesses were heard, and several depositions and exhibits received in evidence, all counsel were granted additional time to file further documentary evidence and briefs. After a thorough review of this evidence, the Court determined that petitioners' application for the issuance of a writ of habeas corpus should once again be denied.

In conformity with the mandate of the United States Supreme Court in *United States ex rel Clifton Alton Poret and Edgar Labat v. Sigler*, 361 U.S. 375 (1960), the District Court made findings of fact regarding the composition of the petit jury panel. It did not make findings of fact regarding the composition of the grand jury because that issue had previously been decided adversely to the respondents herein in *Michel v. State of Louisiana; State of Louisiana v. Edgar Labat and Clifton Alton Poret*, 350 U.S. 91 (1955).

Specifically, the District Court found that the petit jury was legally constituted in accordance with standards set by both the Constitution and State law. The district judge found that the jury commissioners did not use information regarding the race of the prospective jurors in any way in the selection of the jurors. He found further that any laborer, be he White or Negro, would be excused from jury service upon request if he showed the court or jury commissioner that he would be subjected to financial hardship as a result of serving on a jury; that laborers or hourly wage earners were

excused because of financial hardship and were not excluded as a class, and that this procedure was not a violation of the Louisiana law pertaining to jurors. The Court considered the fact that Negroes capable of serving as respect to age have less education (no schooling to six years) and therefore would be excluded on that basis. The Court concluded that the evidence (statistical and testimony) showed that the disproportion which existed in the composition of the petit jury panels in Orleans Parish was the result of scrupulous adherence to the laws of the State of Louisiana pertaining to the selection of juries and economic and educational factors. The district court did not find that the jury commissioners excluded laborers because by doing so they could exclude Negroes from the jury panels; nor did it conclude that the jury commissioners were bound to go out and search the highways and by-ways, nooks and crannies to find more Negroes to replace those who had been excused because they were hourly wage earners or laborers.

The respondents herein then appealed the adverse decision of the District Court to the Court of Appeals for the Fifth Circuit. The Court of Appeals made extensive factual determinations, contrary to and in complete disregard of the District Court's findings of fact, and on the basis of its own independent factual determinations reversed the District Court.

ARGUMENT

This is the first time that the federal rule of standing has been applied in an attack on the composition of a jury in state court. As this is contrary to previous decisions of this court and to decisions of other federal appellate courts, the conflict requires resolution by this Court.

To the extent that the decision below applies the federal rule of standing to a state criminal jury, it is not in accord with the decisions of this Court in the following cases, among others: *Fay v. The People of the State of New York*, 332 U.S. 261, 67 S.Ct. 1613 (1947); *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667 (1954); *Brown v. Allen*, 344, U.S. 443, 73 S.Ct. 397, (1953); and *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159 (1961). It also conflicts with decisions of the Second and Third Circuits in the following cases: *U. S. ex rel Sturdivant v. State of New Jersey*, (Third Circuit) 289 F. 2d 846, cert. den. 368 U.S. 864; and *Vanderwyde v. Denno*, (Second Circuit) 210 F. 2d 105, affirming 113 F. Supp. 918, cert. den. 347 U.S. 949.

To the extent that the more stringent standards announced have been applied retroactively to a conviction which has been final for ten years, it conflicts with the decision of this Court in *Johnson v. State of New Jersey*, 86 S.Ct. 1772.

To the extent of the nullification of the grand jury indictment, it conflicts with the decision of this Court in *Michel v. Louisiana*, 350 U.S. 91, and with the mandate of this Court in *U. S. ex rel Poret v. Sigler*, 361 U.S. 375.

For these reasons and the other arguments which follow, a writ of certiorari should be granted to review the Fifth Circuit Court of Appeals' decision.

I.

DEFENDANTS HAVE NO STANDING TO CHALLENGE THE EXCLUSION OF "DAILY WAGE EARNERS" FROM JURY SERVICE IN STATE COURT UNLESS THEY CAN DEMONSTRATE THAT "DAILY WAGE EARNERS" ARE A DISTINCT CLASS IN THE COMMUNITY AND THAT THEY ARE MEMBERS OF THAT CLASS, OR HAVE BEEN PREJUDICED BY THE EXCLUSION OF THAT CLASS; THE FIFTH CIRCUIT COURT OF APPEALS DECISION THAT DEFENDANTS HAVE STANDING IS CONTRARY TO UNITED STATES SUPREME COURT DECISIONS

In a split decision, (4 majority, 2 concurred, 1 dissented) the Fifth Circuit Court of Appeals held "the systematic exclusion, as a class, of all manual laborers, outside workers, artisans and earners making a daily wage, deprived the petitioners of an impartial jury, a cross section of the community, in violation of the Due Process and equal protection clauses of the Fourteenth Amendment". Labat, Page 65 (R 417). This holding is so interwoven with the other conclusions reached in the majority opinion as to be inseparable therefrom.

Holding that the exclusion goes to the fairness of the trial, the Court stated that it "would compel condemnation of the practice *without the necessity of the Court's finding actual prejudice affecting the outcome of the case*". Labat, Page 54, (R 406).

Additionally, two judges on the panel concurred in the result reached by the majority, but disagreed with the majority that race was a factor, basing their concurrence solely on the exclusion of daily wage earners, and holding that petitioners had standing without a showing of prejudice to complain of the "wage earner class" exclusion on the basis of the Federal "fair community cross section" standard of *Ballard v. United States*, 329 U.S. 187, 67 Supreme Court, 261. (Labat, Pages 102-103 (R 454-455)).

The aforesaid holding of the Fifth Circuit Court of Appeals and the imposition of the Federal "fair community cross section" standard, without a showing of prejudice, is contrary to the United States Supreme Court's decisions in *Fay v. The People of the State of New York*, 332 U. S. 261, 67 Supreme Court 1613 (1947); *Hernandez v. Texas*, 347 U.S. 475, 74 Supreme Court 667 (1954); *Brown v. Allen*, 344, U.S. 443, 73 Supreme Court 397 (1953) and *Hoyt v. Florida*, 368 U.S. 57, 82 Supreme Court 159 (1961) which establishes the following principle: In *state* criminal cases attacking jury composition *for reasons other than exclusion because of race*, the accused must prove not only that a certain group was excluded, but also that the group constituted an identifiable class, and that the non-presentation of that class prevented him, specifically, from having an impartial jury and a fair trial, and thus deprived him of due process. In other words, it is not enough to show that a certain group was excluded; the accused must also show that an impartial jury resulted which prevented him from having a fair trial.

In federal criminal cases, a more stringent rule is

applied. A departure from the federal statutory scheme which deprives the jury system of the broad base which it was designed by Congress to have in our democratic society may be asserted by any litigant, even though he is not a member of the excluded group and no prejudice to the defendant because of the exclusion is shown *Thiel v. Southern Pacific Company*, 328 U.S. 217 (1946); *Ballard v. U.S.*, 329 U.S. 187 (1946); *Glassell v. U. S.*, 315 U.S. 60 (1941); *Rabinowitz v. U.S.*, 366 F. 2d 34 (July 20, 1966). (In the Rabinowitz case, supra, 366 F. 2d at 57, the Fifth Circuit Court of Appeals' opinion pointed out that in jury exclusion cases, "the Federal judiciary, under the Fifth Amendment's due process clause, the Supreme Court's exercise of its supervisory powers, and federal statutes are more strictly regulated than are the states". The Fifth Circuit also noted, 366 F. 2d at 54 of the Rabinowitz decision, that it is possible that the exclusion of wage earners, struck down in the Thiel decision, could now be ordered by a federal district judge after appropriate findings under 28 U.S.C. Section 1863b. This means that the Thiel decision striking down the exclusion of an economic class could not rest on constitutional grounds, but rests only on statutory law affecting the federal courts.)

The aforesaid federal rule of Thiel, Ballard and Glassell is not applicable in state proceedings, however. *Fay v. The People of the State of New York*, supra; *Brown v. Allen*, supra. In Fay, 332 U.S. at 287, this Court, speaking of the state court defendant's reliance on the Thiel, Glassell and Ballard decisions, stated:

> "But those decisions were not constrained by any duty of deference to the authority of the State over the local administration of justice.

> They dealt only with juries in federal court. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may constitutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

In *Brown v. Allen*, 344 U.S. at 473, note 23, this Court said:

> "Rules dealing with the selection of juries in federal courts as announced in *Thiel v. Southern Pacific Co.* (citation omitted) are not applicable in state court proceedings. *Fay v. People of State of New York* (citation omitted)."

Nevertheless, the Court of Appeals' decision in the case at bar applies the federal standards of Thiel, Ballard, and Glassell to state criminal proceedings. It determined that the excusing of "daily wage earners" prevented a fair cross section of the community from being placed on the jury and deprived defendants of due process even though:

1. There is no evidence in the record to show that defendants were themselves members of the class referred to as "daily wage earners", which was allegedly excluded from jury service. *Fay v. The People of the State of New York*, supra; *Rawlin v. State of Georgia*, 201 U.S. 638.

2. There is no evidence in the record to show that defendants were prejudiced by the exclusion of "daily wage earners", a group to which they did not belong.

3. There is no evidence in the record to show that "daily wage earners" formed a distinct identifiable class, which was singled out for different treatment by the rest of the community, or was subject to prejudice. *Hernandez v. State of Texas*, supra.

In *Fay v. the People of the State of New York*, supra, 67 S. Ct. at 1630, the Court explained that in cases where there is purposeful discrimination in jury selection *because of race or color*, prejudice to the accused need not be found, because Congress has specifically made it a crime to disqualify citizens from jury service because of race or color. 18 stat., 336 as amended, 18 U.S.C.A. Section 243; se ex parte Virginia 100 U.S. 303 (1880); *Pierre v. Louisiana*, 306 U.S. 354 (1939). Because Congress has specifically forbidden by statute the exclusion from jury service because of race or color, such an exclusion of itself, makes the jury panel illegal and prejudice to the particular defendant need not be shown. "But as to other exclusions, we must find them such as to deny a fair trial before they can be labelled as unconstitutional". As stated in the opinion of the Court in the *Fay* case, even a purposeful occupational or economic discrimination is not a presumptive constitutional violation, but in order to be unconstitutional, such exclusions must be shown to have deprived the particular defendant of a fair trial.

The rule of *Hernandez v. Texas*, supra, is that the exclusion of an identifiable class of persons from jury service on grounds other than race or color, may deprive a defendant *who is a member of that class* of the constitutional guarantee of equal protection. *However, this rule does not apply unless the accused demonstrates that the excluded class forms an identifiable group*

which may be the subject of prejudice, or is singled out for different treatment by the rest of the community. *Swain v. Alabama*, 330 U.S. 202, 85 S.Ct. 824,827; *Richards v. State*, 144 Florida 177, 197 So. 772, cert. dismissed, 61 S.Ct. 737, 312 U.S. 662.

In the case at bar, there is nothing to show that "daily wage earners" are an identifiable group and subject to prejudice in the community. Speaking of the constitutional objection that "laborers, craftsmen, and service employees and others of like occupations, amounting in sum to the exclusion of an economic class," were excluded from jury service, this Court in *Fay v. the People of the State of New York*, 332 U.S. at 291-292, said, "No significant difference in viewpoint between those allegedly excluded and those permitted to serve has been proved and nothing in our experience permits us to assume it . . . we are not ready to assume that these differences of function degenerate into a hostility such that one cannot expect justice at the hands of occupations and groups other than his own." See also *Rawlins v. State of Georgia*, 201 U.S. 638 at 640: "The nature of the classes excluded was not such as was likely to affect the conduct of the members of jurymen or to make them act otherwise than those who were drawn would act."

The Fifth Circuit Court of Appeals in the instant decision assumes without proof that "daily wage earners" formed an identifiable class subject to prejudice in Orleans Parish. See *Hernandez v. Texas*, 347 U.S. 475. The appellation "daily wage earners" is a misnomer. The term "exclusion" is misleading. There was no blanket exclusion, but a liberal granting of excuses by the request of the prospective jurors. The record shows

that the persons who were excused from jury duty were those who wanted to be excused because they would lose their entire income during the long period of jury service. They were not excused because they were daily wage earners, but because of financial hardship. This group who wanted to be excused included carpenters, painters, welders, mechanics, shipfitters, electricians, truckdrivers, boilermakers, service employees, plasterers, and individual proprietors who had to keep their businesses going themselves (R 62-63, 80, 81, 82, 92). This is hardly an "identifiable class." No effort was made during the trial of the instant case to show that persons following the foregoing occupations formed a class antagonistic to white collar workers or any other group or that they were singled out in the community for prejudicial treatment in any way. While making much of the fact that according to the census ten per cent of the Negro work force were craftsmen, the Appeals decision fails to note that the Census shows that twenty per cent of the White work force were craftsmen, and that laborers and craftsmen together comprised twenty-six per cent of the White work force (R 268-269, Table 77). Thus there is nothing in the record to show that the excused persons were a homogenous group capable of identifying with each other because of race, or any other factor.[1]

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[1]With reference to the Appeals Court's conclusion that 37% of the Negro work force were excluded because 37% of the Negro work force were laborers, this conclusion is erroneous as the figure is derived from the United States census, and includes persons 14 years old and over. How many of this percentage could meet the qualifications of age, residency, literacy, citizenship? How many were self-employed or merely employees? How many were unemployed? How many classified as laborers in the Census were working for governmental agencies or corporations which continued their pay during jury service, and would therefore not be excused from jury service? The Jury Commissioner's Supervisory Clerk testified that warehousemen, shipping clerks, porters, and anyone whose employer would let him serve on the jury without docking him, were *not* excused. (R.81) It is only after these un-

In *Hoyt v. Florida*, Supra, which cites *Fay v. The People of the State of New York*, supra, with approval, a Florida law which provided that women are not called for jury service in State Court unless they are registered with the Clerk of Court, was held not violative of the 14th Amendment. Had the Ballard decision, supra, applied to State Court proceedings, the Court could not have reached the result which it did in *Hoyt v. Florida* as the Ballard case held that the mere limitation or exclusion of women from Federal jury service was of itself sufficient ground for a reversal of a Federal Court conviction.

This is in accord with the view of the Ballard case in *Fay v. The People of the State of New York*, 332 U.S. at 290, wherein the Court said: "The contention that women should be on the jury is not based on the Constitution . . . We may insist on their inclusion on federal juries where by state law they are eligible (citing Ballard case), but woman jury service has not become a part of the textual or customary law of the land that one convicted of crime must be set free by this Court if his state has lagged behind what we personally may regard as the most desirable practice in recognizing the rights and obligations of womanhood". The same argument is applicable to the excusing of "daily wage earners", struck down by the Appeals court in the case at bar. An accused convicted in state court should not be

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known percentages are determined that we would have any figure which might even *suggest* the percentage of the Negro work force which would be excused at their request because of financial hardship. Contrary to the appellate court opinion, the district court did not conclude that 37% of the Negro work force was excused, but merely used the 37% figure from the Census to corroborate the well-known fact that ill-educated persons tend to do manual work; and that since many Negroes were poorly educated, many of them were manual laborers.

set free simply because a state court has not allowed what the federal court deems to be the most desirable practice in recognizing the rights and obligations of persons employed on a daily wage.

In *Brown v. Allen*, supra, the Court re-affirmed its holding that rules dealing with the selection of juries in Federal Court, as announced in Thiel, Ballard and Glassell are not applicable in State Court. The Court enunciated the principle that when a Federal Court reviews a constitutional objection to a state Court conviction, it may not act to alter State Court pracices which are short of a denial of equal protection or due process in the selection of juries.

This principle was violated by the Fifth Circuit Court of Appeals in its Labat decision when it disapproved as a matter of policy the state court practice of excusing persons who could not afford to serve as jurors, and it determined that the most effective way of altering this practice was to void the conviction of an accused who was not even a member of that group and regardless of whether injury to the accused determinative of the outcome was shown. See Comment, 74 Yale Law Journal 919, 940-941.

The Appeals' decision improperly deprived the state court trial judge of his long recognized discretion to excuse jurors for any reason that he may consider proper, including grounds going to the personal welfare of the juror, such as family or business hardship which would result from jury service, *State v. Fulghum*, 242 La. 767, 138 So. 2d 569 (1962); see also *State v. Dallas*, 187 La. 392, 175 So. 4 (1937); 50 C.J.S. Sec. 205b.

While admitting that the system of excusing persons for financial hardship was "neutral", "principled", and "benign", the Fifth Circuit Court of Appeals nevertheless concluded that the granting of excuses constituted an intentional and systematic exclusion of "daily wage earners", which automatically made both grand and petit jury panels illegally constituted, regardless of prejudice to the defendant determinative of the outcome. This conclusion is contrary to established jurisprudence which follows the "same class" rule in state jury selection cases, or holds that prejudice to the accused must be shown. "This Court, however, has never entertained a defendant's objections to exclusions from the jury except when he was a member of the excluded class." *Fay v. New York*, 332 U. S. 261, 287; *State v. Krieger*, 212 La. 527, 33 So. 2d 58, 59, note 1; *State v. Lea*, 228 La. 724, 84 So. 2d 169, cert. den. 350 U. S. 1007; Slovenko, 17 La. Law Review, at page 686; Comment 27, La. Law Review 393-394; Comment, 74 Yale Law Journal, 919, 920 and note 10. "White defendants have traditionally been barred from raising the issue of discrimination against Negroes on the ground that they lacked standing". Comment, 75 Yale Law Journal 322, 331, note 45.

It is significant that Title II of the proposed Civil Rights Act of 1966 attempted to impose on the states the federal rule of standing of the Thiel, Glassell and Ballard cases, supra. Congress has rejected this measure. The Fifth Circuit Court of Appeals should not have imposed such a rule on the states when Congress has refused to do so.

II.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS THAT THE PURPOSEFUL EXCLUSION OF AN ECONOMIC CLASS WITHOUT MORE IS SUFFICIENT TO VOID A CONVICTION IN STATE COURT CONFLICTS WITH DECISIONS IN THE SECOND AND THIRD CIRCUITS.

In *U. S. ex rel Sturdivant v. State of New Jersey*, (3rd Circuit) 289 F. 2d, 846, cert. den. 368 U. S. 864, the Court refused to strike down the state procedure of obtaining prospective jurors by asking the management of ten large companies for the names of employees on the ground that this excluded certain economic classes. The Court pointed out that the rules of the Glassell case, supra, apply only in federal courts.

In *Vanderwyde v. Denno*, (2nd Circuit) 210 F. 2d 105, affirming 113 F. Supp. 918, cert. den. 347 U. S. 949, the defendant contended that the jury which tried him in State court was weighted in favor of business people as opposed to working people. In refuting the defendant's contention, the Court stated, "Purposeful exclusion (of an economic class) without more is not unconstitutional. Unless the exclusion is such as to deny a fair trial there is no absence of due process".

The State of Louisiana respectfully submits that the United States Supreme Court should review the Fifth Circuit Court of Appeals' decision in the case at bar so as to resolve the conflict between that decision and those of the Second and Third Circuits.

III.

THE RETROACTIVE APPLICATION OF THE NEW STANDARD OF JURY SELECTION IMPOSED UPON STATE COURTS BY THE COURT OF APPEALS' DECISION IS PROHIBITED BY THE DOCTRINE OF JOHNSON V. THE STATE OF NEW JERSEY, 86 SUPREME COURT 1772 (1966)

Labat and Poret were tried in 1953. Their conviction became final in 1956.

The time table of their progress through courts shows that the Court of Appeals' decision in this post conviction proceeding was handed down ten years after their conviction became final.

The application of the new standards set forth in the Court of Appeals' decision to State criminal proceedings is contrary to the United States Supreme Court's decision in *Fay v. New York*, supra; *Brown v. Allen*, supra; *Hernandez v. State of Texas*, supra; decisions which were in effect at the time that the conviction herein became final.

Retroactive application of the new standard as to the exclusion of daily wage earners would seriously disrupt the administration of the criminal laws of Louisiana. The State of Louisiana had reason to rely upon the aforesaid decisions and had reason to believe that the granting of excuses for reasons of financial hardship was a legitimate exercise of its powers.

In 1945 hearings before the House Committee on the

judiciary, 79th Congress, first session, Chief Judge Knox testified that there is a public interest in the exclusion of daily wage earners. While jury duty is an obligation of citizenship, provision for one's family is the first consideration for most men; and that the resentment of a juror who was compelled to serve despite financial hardship, would be anything but conductive to a just verdict. See 5 Moore's Federal Practice, Section 47.04, page 2010.

The retroactive application of the wage earners exclusion rule would require the retrial or release of numerous prisoners found guilty by trustworthy juries selected in conformity with previously announced constitutional standards. It would throw the administration of criminal justice into chaos, for who can tell what excuse from jury service, which is considered legitimate today, might be considered unreasonable by the Federal Court next year?

At the same time, retroactive application of the rule would not have the effect of curing past violations of the primary purpose for which the Fourteenth Amendment was adopted with reference to jury selection; the prevention of the exclusion of Negroes from participation in the administration of justice and the consequential branding of them as inferior. *Strauder v. West Virginia*, 100 U. S. 303 (1880); see *Linkletter v. Walker*, 381 U. S. at 637; Myrdal, An American Dilemna, p. 524.

From two 1880 United States Supreme Court decisions, it is seen that one of the prime purposes of the Fourteenth Amendment with reference to Jury selection is to insure to Negroes their right to participate as

jurors in the administration of criminal justice and the consequent prevention of the ingrained tradition of caste suppression which branded Negroes as inferior by denying them any part in the administration of the law. *Strauder v. West Virginia*, 100 U. S. 303 (1880); Ex Parte Virginia, 100 U. S. 339 (1880); 18 U.S.C. 243; 18 U.S.C. 1343.

With reference to exclusion from Jury in classes other than Negroes, the basic purpose of the Federal "cross section rule" of the Thiel, Ballard and Glassell decisions, applied for the first time to State criminal proceedings in the instant case, is to discourage judges and Jury Commissioners from limiting the participation of any segment of the population in jury service, and it is immaterial whether such limitation has any effect injurious to the accused which is determinative of the outcome of his case. Thus, the basic purpose of the rule does not go to the integrity of the "fact finding process", but is a means to an end of achieving the democratic ideal of participation by all citizens in the administration of justice (Cf. Myrdal's "American Dream").

Prior to the decision in the case at bar, the United States Supreme Court has refused to condemn an entire process of jury selection in State courts solely because State jury selection officials had omitted a particular group. Yet, this is what the decision in the instant case has done. Prior to the decision in the instant case, it has always been necessary for an accused to show either that he was a member of an excluded identifiable class, or that he was prejudiced in some other way by virtue of the exclusion. *Fay v. The People of New York*, supra; *Brown v. Allen*, supra; *Hernandez v. Texas*, supra.

The State of Louisiana respectfully submits that the Federal policy rule formulated in the Ballard, Thiel, Glassell decisions should not be imposed on State courts at all. In the alternative, however, if this court should hold that State courts are to be bound by the Federal standards, then those standards should not be applied retroactively to convictions which are already final.

While the Thiel, Ballard, Glassell standards applied in the instant case by the Fifth Circuit Court of Appeals might, by stretching the imagination, guard against every possibility of partial juries in every instance where excuses from jury duty are liberally granted for reasons of financial hardship, they encompass many situations in which the danger of a partial jury is so remote as to be nonexistent and are thus too broad for retroactive application. At the same time, present case law provides sufficient safeguards for persons whose State court convictions are final or whose trials are already completed to show that they were a member of an excluded identifiable class, or were prejudiced by reason of the arbitrary exclusion of a class.

As pointed out in *Johnson v. The State of New Jersey*, 86 Supreme Court at 1778, the choice between retroactivity and non-retroactivity does not turn on the value of the constitutional guarantee involved and the constitutional guarantee is not disparaged by declining to apply it retroactively. Certainly the right of a defendant to have an improperly secured confession excluded, which was declined retroactive application in the Johnson case, supra, is equally if not more important to the integrity of the fact finding process as the right of a defendant to object to a jury, from which a group of which he is not a member, has been excluded.

The tests set forth in the Johnson case, supra, for retroactive application are met in the case at bar. The purpose of the rule, as set forth above, does not go to the integrity of the fact finding process; the rule is contrary to prior decisions fairly relied on by State courts in selecting juries; and the retroactive application of the rule would have a disastrous result on the administration of justice by requiring the retrial or release of numerous prisoners found guilty by juries constituted in conformity with previously announced constitutional standards. In appropriate prior cases the United States Supreme Court has already applied new judicial standards in a wholly prospective manner. See *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 84 Supreme Court 461 (1964); *James v. United States*, 366 U. S. 213, 81 Supreme Court, 1052 (1961); See also *Linkletter v. Walker*, 381 U. S. 618, 85 Supreme Court 1731 (1965); *Tehan v. U. S.*, 86, Supreme Court 459 (1966); *O'Connor v. Ohio*, 87 Supreme Court 252 (1966).

The State of Louisiana respectfully submits that the new standards of jury selection applied by the Fifth Circuit Court of Appeals in its Labat decision should, if applied at all, be applied prospectively only to State court convictions which became final after the rule was announced.

IV.

THE RECORD SHOWS THAT THE VARIANCE IN THE PROPORTION OF NEGROES ON THE PETIT JURY PANELS IS EXPLAINED BY EDUCATIONAL AND ECONOMIC FACTORS

The trial court found:

> "The figures in this case actually show that of those jurymen whose race or color was determined, over six per cent were Negroes. Of the total number of names on the venire list, the color or race of forty-four per cent was undetermined. Thus, it would be safe to assume, that if the color of the forty-four per cent were determined, that many of those jurors were certainly of the Negro race, and thus, the percentage of Negroes actually on the jury venire list in New Orleans was something over six per cent. While the Negro population of Orleans Parish comprised about thirty-one per cent of the total population, of the non-white males of age 21 years, approximately twenty-nine per cent had from no schooling whatsoever to only six years. In the same generic group, at the age of 24 years, approximately thirty-one per cent had from no schooling to only six years. . . ."

The record supports the trial judge's findings on disproportions in educational and economic factors in the Negro population.

Table 65 of the 1950 census (R 262) shows:

(1) Although non-whites accounted for less than one-third of the 25 year and over population in New Or-

leans, the number of non-whites having no schooling whatever comprised better than half of that segment of the New Orleans population which was 25 years and over and had no schooling; better than half of that segment of the New Orleans population which was 25 years old and over and had only one or two years of schooling; and half of that segment of the population which had only three or four years of schooling.

(2) Of the 107,910 non-white persons over 25, a total of 36,905 or more than one-third had less than five years of schooling.

(3) Of the 402,285 total white and non-white New Orleans population over 25, a total of 70,535, or seventeen per cent, had less than five years of schooling, as compared with better than thirty-three percent for the non-white segment. As can be seen from the above figures, better than half of the total white and non-white population (70,535) which had less than five years of schooling were non-whites (36,905) although the total non-white population of 25 years and over accounted for less than one-third of the total population of 25 years and over.

(4) The median school years completed for the total New Orleans male white and non-white population of 25 years and over is 8.5, whereas the median school years completed for the non-white population of 25 years and over is 6.2. The non-whites are better than two years behind the total population in median school years completed.

(5) Although the number of non-white males 25 years and over accounted for better than twenty-six per

cent of that segment of the population, the number of non-white males 25 years and over who completed four years of high school accounted for less than nine per cent of the total male population of 25 years and over who had completed high school; and accounted for less than five per cent of the total male population of 25 years and over who were college graduates.

Table 44 of 1950 Census (R 258) shows that of the 100,070 non-whites over 25 years old, 53,880, or more than half had completed six years *or less* of schooling.

The Jury Commissioners for the Parish of Orleans testified that it was their job to obtain qualified persons for prospective jury service. Accordingly, they secured names of prospective jurors from the city directory and sent out summonses for jury duty in Orleans Parish impartially to males whose names are listed in the New Orleans City Directory, (which does not disclose race) with no knowledge of the race of the persons be summoned for jury duty. (R 77, 122-123, 129, 141, 184-185, 225, 207-208).

The summonses directed each prospective juror to appear for interviewing before the Commission. On the back of each summons is listed certain data which the prospective juror is required to fill out and bring with him at the time of his appearance. (R 187, 191.)

The names and addresses of the persons found eligible after interviewing by the Commission are listed and are inscribed on small pieces of paper and these slips are periodically placed in the jury wheel. (R 187, 191.)

Through March, 1953, and for five years preceding,

the Jury Commission maintained no records which would indicate the race of any person summoned as a prospective juror in Orleans Parish. (R 104, 119, 124, 149-150, 172, 184-185, 217). Nor was race indicated in the list of names which the Jury Commission prepared showing persons competent to serve as jurors; nor was it indicated on the slips of white paper which were placed in the jury wheel from which the names are drawn, which slips of papers are uniform in color and contain only the name of the prospective juror and his address (R. 125-126, 187, 191, 226).

Although the jury commissioners estimated, from their experience on interviewing days, that one out of every six persons reporting to the Jury Commission for interviews to determine their eligibility as jurors was a Negro, the percentage of illiterate Negroes reporting was so great that an exceedingly large percentage of Negroes who reported were not qualified, and an exceedingly large number disqualified themselves by stating that they were self-employed, or that their employers would not excuse them from work and would not pay their wages if they served on a jury and that they were unable to support themselves and their families while serving as jurors (R 129-130, 140, 166-168, 203, 268).

Although a great number of Negro males declared themselves unable to perform jury service because of illiteracy, low level of education or inability to afford jury service, there still were at least ten per cent of the petit jury veniremen drawn at random from the jury wheel by the jury commissioners and sent to the Criminal District Court for possible service on petit juries who were Negroes (R. 166-167; R 279, paragraph 13 of joint stipulation No. 1).

Contrary to the opinion of the Fifth Circuit Court of Appeals, there was no blanket exclusion from jury service of daily wage earners by either jury commissioners or judges. No person summoned by the jury commissioners to be interviewed as a prospective juror, and no person summoned to court as a petit jury venireman, was excused for reasons of financial hardship unless the prospective juror himself requested it (R 58, 61-63, 67-68, 133, 148, 175-76). No attempt was made at the trial of the instant case to show that any Negro male or any daily wage earner or any laborer had professed his desire to serve on a jury or had volunteered and had been refused. The simple truth is that the jury commissioners for the Parish of Orleans and the judges were glad to accept for jury duty any male resident over 21 who could fill out the jury notice questionnaire, and who did not ask to be excused for financial hardship. Their ever present problem was how to get enough jurors (R 92, 129, 133, 167-168, 217, 207-208).

Nor was any distinction as to color made by the jury commissioners or the judges in releasing prospective jurors for reasons of financial hardship (R. 67-68, 70, 126, 133, 176).

Thus, there is a logical explanation for the ratio of Negroes on the petit jury in Orleans Parish. As has been pointed out above, the disproportion of the number of Negroes on petit jury panels is explained by their low level or educational attainment as compared to the rest of the population; their lack of economic resources resulting from their lack of education, making for undue financial hardship in the event of jury service; and the liberality of the court for benign reasons in granting excuses from jury service for reasons of undue financial

hardship in view of the fact that criminal court jurors are not paid and that petit jury service extends for one month. Finally, it is impossible to know how many Negroes on the final petit jury venire were eliminated from jury service by both defense and prosecution through peremptory challenges, (R 70) as no records of the race of jurors were kept prior to March, 1953 (R 104, 119, 124, 184-185, 217). See *State v. Barksdale*, 247 La. 198, 170 So. 2d 374; *Swain v. Alabama*, 380 U.S. 202.

"The facts are clear. More Negroes lack educational qualifications to be jurors than whites, and this lack of education among the Negroes inevitably compels them to accept less gainful employment, often such as to create an undue hardship if they are compelled to accept jury service, which is without pay in Orleans Parish. . . . Over half of the Negro males in Orleans Parish of jury service age have such a limited education that their eligibility for jury duty is often unsuitable, whereas, less than one-fourth of the white males are in the same category. There is, therefore, a rational and logical explanation for the variance in the number of Negro persons whose names appear on the general venire." *State v. Barksdale*, 247 La. 198, 170 So. 2d 374, cert. den. 86 S.Ct. 297 (1965).

In the instant case the record shows that the percentage of Negro males qualified for jury service was severely limited by factors of education and economics unrelated to a system of planned discrimination. The State of Louisiana is of the respectful opinion that relators have completely failed to prove any systematic discrimination against members of the Negro race by purposeful limitation in the selection of juries in Or-

leans Parish, and that the State of Louisiana has adequately explained disproportion between the Negro population and the number of Negroes on the petit jury venires. The crux of the matter is that Negroes started at a lower percentage and their attrition is much higher along the line, due to educational and economic factors, and due in part also to psychological factors within the Negro jurors themselves, as for example their aversion to capital punishment and the difficulty the successful Negro often has in identifying with the rest of the Negro community and working for its betterment.

As this Court said recently in *Swain v. Alabama*, purposeful discrimination may not be assumed or merely asserted; it must be proven, 380 U.S. at 205. In the instant case, respondents' contention of purposeful discrimination in the selection of juries in Orleans Parish consists solely of assumption and assertion and is not supported by one iota of proof. Further, any presumption of discrimination, which may have arisen from the variation between population ratio and the ratio of Negroes on petit jury panels has been completely rebutted by the State of Louisiana, which rebuttal is based on uncontradicted facts and figures, and not on merely argument and theory. As this record shows, there are many varied and complex reasons to explain the disproportion, but deliberate and intentional limitation of Negroes on the part of the jury commissioners and judges in the selection of petit jury panels is not one of these reasons.

V.

THE COURT FAILED TO APPLY RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE AND THE JURISPRUDENCE THAT FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS.

The rule is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony or of a fact deduced or inferred from uncontradicted testimony. *District of Colombia v. Pace*, 320 U.S. 698, 88 L. Ed. 408, 64 S.Ct. 406. Rule 52(a) plainly provides a review by the appellate court only of the sufficiency of the evidence to sustain the findings.

Under Rule 52 the reviewing court is required to review the evidence, but that does not mean it should substitute its interpretation and construction of the evidences from that of the trial court. *Fegles Construction Company, Ltd. v. McLaughlin Construction Company*, 205 F. 2d 637; *Sanders v. Leech*, 158 F. 2d 486; *Schilling v. Schwitger-Cummins Company*, 142 F. 2d 82. It is not the function of the reviewing court to retry a case or pass upon questions of fact, the determination of which depended upon credibility of witnesses and the weight of evidence; or to substitute its judgment for that of the trier of the facts which had reached permissible conclusions.

The District Court for the Eastern District of Louisiana, as pointed out by the dissenting opinion of Judge Gowin, rendered an opinion in conformity with the mandate of the United States Supreme Court in

United States ex rel Clifton Alton Poret and Edgar Labat v. Sigler, 1960, 361 U.S. 80 S.Ct. 404, 4 L. Ed. 2d 30. The district court opinion did not, as does the appeal opinion, consider any attack on the composition of the grand jury. Nor was any evidence on the grand jury placed in the record (R 62). The United States Supreme Court considered the issue of the composition of the grand jury and ruled adversely to petitioners. *Michel v. State of Louisiana. State of Louisiana v. Edgar Labat and Clifton Alton Poret,* 1955, 350 U.S. 91, 76 S. Ct. 158, 100 L. Ed. 92, rehearing denied 350 U.S. 955. The district court correctly relied on this decision as disposing of any question relating to the composition of the grand jury.

With reference to the petit jury question, the district court did not rely on the doctrine of waiver as its decision expressly states: "Out of an abundance of caution, detailed testimony was taken concerning the composition of the petit jury involved and concerning the general practice in the past in the Parish of Orleans, State of Louisiana in selecting and drawing juries. A review of this testimony convinces this Court that there is simply no merit to petitioners' contentions." *United States ex rel Poret and Labat v. Sigler,* (1964) 234 F. Supp. 171. The district judge found that the jury commissioners did not use information regarding the race of the prospective jurors in any way in the selection of the jurors. He found further that any laborer, be he White or Negro, would be excused from jury service upon request if he showed the court or jury commissioner that he would be subjected to financial hardship as a result of serving on a jury. Laborers or hourly wage earners were excused because of the financial hardship and were not excluded as a class which

was held to be not a violation of the Louisiana law pertaining to jurors. Cited in support of the propriety of such action was *Fay v. People of State of New York*, 332 U.S. 261, 67 S. Ct. 1613 (1947); *United States v. Flynn*, (C.A. 2 Cir. 1954), 216 F. 2d 354. The Court considered the fact that Negroes capable of serving as respect to age have less education (no schooling to six years) and therefore would be excluded on that basis. The Court concluded that the evidence (statistical and testimony) showed that the disproportion which existed in the composition of the petit jury panels in Orleans Parish was the result of scrupulous adherence to the laws of the State of Louisiana pertaining to the selection of juries. The district court did not find any evidence that the jury commissioners excluded laborers because by doing so they could exclude Negroes from the jury panels; nor did it conclude that there were any circumstances proved which required the jury commissioners to find more Negroes to replace those who had been excused because they were hourly wage earners or laborers.

Even the Fifth Circuit Court of Appeals did not find that the source of the jury list (the City Directory) used by the Jury Commissioners did not reasonably reflect a cross section of the population; nor did the Fifth Circuit Court of Appeals find that the economic and educational factors, which resulted in variation of the proportion of Negroes and Whites on the jury list from the racial proportion in the community, were in any way related to a system of planned discrimination. What the Fifth Circuit Court of Appeals did find in its majority opinion was that the Jury Commissioners were required to go outside of their normal and unimpeachable source (the City Directory) and consciously include

Negroes "to compensate for the exclusion of Negro wage earners" resulting from the economic and educational factors. This requirement by the Fifth Circuit Court of Appeals, that Jury Commissioners must go outside of their ordinary source to compensate for groups limited by non-discriminatory factors, is contrary to the posture of the United States Supreme Court in prior decisions. In *Brown v. Allen*, 344 U. S. 443, 73 Supreme Court 397 (1953) this Court did not require the Jury Commissioners to go outside of their ordinary source, the tax lists, and seek additional Negroes to compensate for the lower percentage of Negroes found thereon due to the inequality of their educational and economic opportunities. Nor did this Court require the Jury Commissioners in *Hoyt v. Florida*, 368 U.S. 57, 82 Supreme Court 159 (1961) to seek out additional women to compensate for those who had not volunteered for Jury service; nor did this Court in *Fay v. The People of the State of New York*, 332 U.S. 261, 67 Supreme Court 1613 (1947) require the Jury Commissioners to seek out laborers, craftsmen and service employees to compensate for the greater proportion of these groups who were disqualified by virtue of requirements of citizenship, property and literacy. Furthermore, had the Orleans Parish Jury Commissioners consciously sought out Negroes outside of their normal source of names, they would have been vulnerable to the holding of the Fifth Circuit Court of Appeals in *Collins v. Walker*, 329 F. 2d 100, reh. 335 F. 2d 417, cert. den. 85 S. Ct. 189, 379 U. S. 901, until the Fifth Circuit overruled itself in *Brooks v. Beto*, 366 F. 2d 1 (July 1966).

VI.

THE FIFTH CIRCUIT COURT OF APPEALS' DECISION REVERSED THE UNITED STATES SUPREME COURT'S DECISION IN MICHEL V. STATE OF LOUISIANA, 350 U.S. 91.

In *Michel v. State of Louisiana*, 350 U. S. 91, (1955) the United States Supreme Court ruled against the defendants on the grand jury question years ago. In its last remand of this case to the Federal District Court, the United States Supreme Court recognized that the grand jury question was dead, when it limited the remand to "the disposition of the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of *petit* jury panels in violation of the Federal Constitution." (Emphasis supplied). *U. S. Ex Rel Poret v. Sigler*, 361 U. S. 375 (1960).

Despite the United States Supreme Court's decision in *Michel, supra*, and despite its limited language in the above quoted remand, the Fifth Circuit Court of Appeals has retroactively applied a 1963 decision *(Fay v. Noia*, 372 U. S. 391) and has nullified the indictment on the ground that the grand jury, as well as the petit jury, was unconstitutionally constituted.

It is the position of the State of Louisiana that both the petit jury and the grand jury were properly selected, but that even if this Court should hold that the petit jury was improperly selected, that the grand jury issue was foreclosed by a prior decision of this Court, and that the defendants should have been recognized as still subject to custody under the State indictment and

that the only appropriate order was a remand to the State Court for retrial. *Irvin v. Doud*, 81 Supreme Court 1639 (1961).

CONCLUSION

For all of the foregoing reasons, the State of Louisiana respectfully prays that this Honorable Court should issue a writ of certiorari directed to the Fifth Circuit Court of Appeals; that the decision rendered by the Fifth Circuit Court of Appeals herein should be reversed; that the decision rendered herein by the District Court should be affirmed and the writs of habeas corpus discharged.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing petition for Writ of Certiorari to the United States Fifth Circuit Court of Appeals has been served on all opposing counsel of record in accordance with law and the rules of the United States Supreme Court by deposition the same in the United States mail with first class postage prepaid, addressed to each counsel of record at his post office address.

New Orleans, Louisiana, this _____ day of _____, 1966.

_____

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APPENDIX A
OPINION OF COURT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 22218

EDGAR LABAT and CLIFTON ALTON PORET,
Appellants,

versus

ROBERT B. BENNETT, Acting Warden, Louisiana State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(August 15, 1966.)

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, and COLEMAN, Circuit Judges.

WISDOM, Circuit Judge: "The law hath not been dead, though it hath slept."[1]

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[1] Shakespeare, Measure for Measure, Act II, Sc. 2.

"Death" for thirteen years has kept close tab on Edgar Labat and Clifton Poret. March 23, 1953, an all-white jury in the Criminal District Court for the Parish of Orleans, Louisiana, found Labat and Poret, the two Negro petitioners in this habeas corpus proceeding, guilty of the aggravated rape of a white woman. The jury brought in no recommendation of mercy; the defendants were sentenced to death by electrocution. Since then they have been in solitary confinement on Death Row in the Louisiana State Penitentiary. Nine times courts stayed their execution; once, less than three hours before they were to be strapped in the electric chair.

About four o'clock Sunday morning, November 12, 1950, a white woman and her escort were walking along Thalia Street in New Orleans.[2] As they approached Tonti Street, two Negroes attacked them from behind. One, a tall Negro, allegedly Labat, seized the escort by the neck and demanded money. The escort testified at the trial that "he did not see a weapon . . . [but the Negro] had his hand in his pocket as if to make [one] assume that he had a weapon". The escort handed over Ten Dollars and was released. He ran for help. Meanwhile, the other

[2] They had taken a taxicab to the residence of the young woman's married sister where she had expected to spend the rest of the night. The house was on a dimly lighted corner of a run-down section of the city. They were unable to get in the house and were unable to arouse the occupants. A Negro standing nearby, Earl Howard, helped them attempt to waken the occupants. After this failed, Howard walked away. The escort then suggested that they walk several blocks to a main street to hail a taxicab. On the way they passed Howard talking with two other Negroes. The case turned on identification of the defendants. Howard was a key witness. See footnote 11.

Negro, allegedly Poret, dragged the woman halfway down the street and into a dark alley between Thalia and Calliope Streets. In a few minutes the tall Negro joined him. One Negro raped the woman while the other held her. Afterwards, they took her out of the alley and headed in the direction of an empty lot. A police car appeared; the attackers fled.

At 11 o'clock Sunday morning, on information furnished by one Earl Howard, who had been talking with two other Negroes just before the assault, police arrested Labat in his home. He has been continuously in custody since that time. Poret, whom the charging witness identified from a photograph in police files, could not be found. Some time afterwards New Orleans police located him in Tennessee serving a sentence for theft. Late in 1952 he was brought back to Louisiana to stand trial with Labat.

By appeal through the Louisiana courts to the United States Supreme Court and in habeas corpus proceedings in state and federal courts, the petitioners have consistently and unsuccessfully contended that they were denied a fair trial because of the systematic exclusion of Negroes from the jury system in Orleans Parish. Finally, the United States Supreme Court, reversing the Fifth Circuit, remanded this habeas proceeding to the district court for that court to decide whether Negroes were "limited and excluded in the selection of petit jury panels" in Orleans Parish. *United States ex rel Clifton Alton*

Poret and Edgar Labat v. Sigler, 1960, 361 U.S. 375, 80 S.Ct. 404, 4 L.Ed.2d 30. After an evidentiary hearing, the district court found: since the petitioners had failed to make timely objections to the grand jury and the petit jury, "they are now deemed to have *waived* these objections"; "the disproportions which exist between the races on the jury panels in Orleans Parish have resulted . . . from a scrupulous adherence to the laws of Louisiana . . . which laws are reasonable and constitutional"; there was "no proof presented here of systematic exclusion of Negroes from the jury panels in New Orleans". 234 F. Supp. 171, 179. Accordingly, the district court once again denied the petitioners' application for the issuance of a writ of habeas corpus. The petitioners appeal from that judgment. We reverse.

I.

The district court's partial reliance on the ubiquitous fiction of waiver compels this Court to trace the petitioners' contentions through most of the twists and turns of their convoluted legal proceedings.

A. Labat and Poret filed their motions to quash the indictments November 7, 1952. *Although this was three and a half months before their trial, the petitioners have never had their day in court:* never had their day to prove that they were denied a fair trial by a jury of their peers; never, that is, until the district court held its hearing March 31, 1964, in obedience to the Supreme Court's mandate.

Each motion to quash read as follows:

> "That considering the Negro population of the Parish of Orleans, and the number of Negroes qualified for jury service, there had been systematic, unlawful and unconstitutional exclusion of Negroes from the *General Venire* and Grand Jury panel and Grand Jury involved in the returning of the indictment herein; that said systematic, unlawful and unconstitutional exclusion of Negroes from said units has existed continuously prior hereto for a number of years in the Parish of Orleans; that in those instances where Negroes have been included in the General Venire and Grand Jury panels referred hereto in, Negroes have been discriminated against by an arbitrary and inappropriate [*sic*] limiting of their number of State Officials who have not sufficiently acquainted themselves with the qualifications of all potential jurors." (Emphasis added.)

The motion is clear enough to a Louisiana lawyer. Petit jury panels, the final venires, are derived from the proposed venire which is drawn at random from the jury wheel *(the general venire)*. The motion, therefore, attacks the composition of petit juries and their venires as well as that of grand juries and their venires. The vice permeates the entire jury system; the motion attacks the system. It appears to this Court, however, on reading the old briefs and records that until the habeas action was filed in 1957, al-

though petitioners' counsel did not abandon their attack on the general venire, they concentrated their attack on the grand jury.[3] There were several reasons for this venial sin. First, the grand jury is *selected* by the judge from its venire rather than drawn at random. Second, in October 1952 Judge William J. O'Hara of the Criminal District Court for the Parish of Orleans, making local history, quashed an indictment on the ground that Negroes had always been excluded from grand juries in Orleans Parish. *State of Louisiana v. Dowels*, No. 139, 324, Criminal District Court for the Parish of Orleans, (The cast is officially unreported. Justice Black quotes from the opinion at length in his dissent in *Eubanks v. Louisiana*, 1958, 356 U.S. 584, 588-89, 78 S.Ct. 970, 2 L.Ed.2d 991, fn 4).

A review of the petitioners' tortuous ascents and descents through the courts shows that until the Supreme Court rendered its latest order in this case, 361 U.S. 375, all of the courts dealing with the jury issue treated the motions narrowly as a challenge to the grand jury. As such the challenge was vulnerable procedurally: Louisiana law required that objections to a grand jury be raised before the expiration of the third judicial day following the end of the grand jury's term or before trial whichever is earlier.

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[3] The exclusion of Negroes from the grand jury is a ground for quashing the indictment, even when there is no objection to the composition of the petit jury that finds the defendant guilty. Pierre v. Louisiana, 1939, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; Hill v. Texas, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559.

Judge Fred Oser, Section "C" of the Criminal District Court for the Parish of Orleans, dismissed the motions to quash, relying on Article 202 of the 1928 Louisiana Code of Criminal Procedure (LSA-R.S. 15: 202). This article provides that:

> "All objections to the manner of selecting or drawing any juror or jury or to any defect or irregularity that can be pleaded against any array or venire must be filed, pleaded, heard, or urged before the expiration of the third judicial day of the term for which said jury shall have been drawn, or before entering upon the trial of the case if it be begun sooner; otherwise, all such objections shall be considered as waived and shall not afterwards be urged or heard."

Article 202 has always been conspicuous for its ambiguity.[4] To resolve one problem, the Louisiana Su-

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[4] In 1953 no one could say with any certainty what prescriptive period was provided for in Article 202. Professor Dale Bennett (L.S.U.), Coordinator for the revised Louisiana Code of Criminal Procedure just enacted by the legislature, has described Article 202 as follows: "Insofar as it relates to objections to the grand jury panel there is apparent conflict with other articles which permit the filing of objections to the indictment at any time prior to the commencement of the trial. As applied to the time for objecting to petit jury venires, it states a rule which also frequently proves unworkable. Undoubtedly the principal source of difficulty has arisen out of the attempt to set out a single rule that would govern the time for filing objections to the general venire and petit jury lists, and that would also govern the time for objecting to the composition of the grand jury as a ground for quashing indictments. . . . Article 287 declares that the demurrer and motion to quash 'must be filed tried and disposed of before trial on the merits.' Even more latitude is apparently contemplated by the declaration in Article 253 that objec-

preme Court, as the Court itself said, "strained" the phrase "expiration of the third judicial day of the

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tions to the indictment must 'be made prior to the commencement of the trial or at such time thereafter as the court in its discretion permit.' In cases where the indictment is defective by reason of the illegal composition of the grand jury list, added confusion is injected by Article 202." Bennett, Louisiana Criminal Procedure—A Critical Appraisal, 14 La. L. Rev. 10, 17 (1953). Professor Ralph Slovenko (Tulane) has written: "A literal application of the article would in many situations render the filing of an objection impossible. . . . Article 202, as interpreted in the *Wilson* case, is applicable to objections to petit jury venires as well as to grand jury venires. State v. Chianelli, 226 La. 552, 76 So. 2d 727 (1954) . . . *As a result, the defendant has a right to file objections to the petit jury venire at any time before the trial, because the trial is never held 'after the end of' the jury term.*" (Emphasis added.) Slovenko, The Jury System in Louisiana Criminal Law, 17 La. L. Rev. 655, 678 (1957). "This article . . . has been a continuous source of difficulty . . . [I]f the court were to apply the article to 'all objections to . . . *any* array or venire' (emphasis added) as its literal meaning suggests, defendants would often be denied an opportunity to challenge the legality of the jury list or venire." Ellison, Comment, Time for Urging Objections to Jury Lists and Venires, 15 La. L. Rev. 749, 754 (1955). "[T]he language of Article 202 falls far short of making clear the legislative intent . . . a defendant with *bona fide* grounds for objection, *unable to determine which article is applicable to his case or just what limit the applicable article imposes, may unwittingly allow the time for urging his objection to lapse by relying on the wrong Code article or giving it a different interpretation from that of the Supreme Court.* In its present ambiguous form this Article is one source of confusing technicalities of procedure in criminal cases which *can be used as a means of sidetracking the issue of race discrimination in the selecting of juries.*" (Emphasis added.) Brash, Comment, Time to File Objections to the Drawing of Selecting of Juries, 18 Tul. L. Rev. 462, 481 (1944). In the Comments on Article 535 (former Article 202) of the Projet of the Louisiana Code of Criminal Procedure, the Reporter states: "It was the concensus of the Council that *Art. 202 of the 1928 Code provided an unworkable formula, which should be discarded. Objections to the composition and method selection of jury venires (Art. 532(9)) and of the grand jury (Art. 533 (1)) can only be urged by the motion to quash which must be filed before the trial commences.* However, it is desirable to adopt a liberal rule as to the time for filing a motion to quash on these important grounds. They are, therefore, listed in Paragraph B as grounds which may be urged as of right until three judicial days before the trial, and may be raised thereafter with the court's permission, until commencement of trial." (Emphasis added.) Projet, Article 535, p. 267.

term" to mean the third judicial day after the expiration of the term. *State v. Wilson*, 1943, 204 La. 24, 14 So. 2d 873.[5] "Even the *Wilson* construction of the former Article 202 would be of scant help to a defendant who did not procure counsel until after the three-day deadline had passed."[6] That is Poret's case.

In the state courts this case turned on critical dates. The grand jury that indicted the petitioners was empanelled September 5, 1950. It returned the indictment against Labat and Poret December 11, 1950. The grand jury term expired March 5, 1951. Labat was arraigned January 3, 1951; Poret was arraigned October 27, 1952. The motions to quash were

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[5] In State v. White, 1939, 193 La. 775, 192 So. 345, however, the defendant, a fugitive for three years after his indictment, filed an objection to the grand jury and venire after his trial. It came too late, not because of the expiration of the third judicial day of the grand jury's term but because "a motion to quash the indictment may [must] be made at any time before the trial of the case." In State v. Chianelli, 1954, 226 La. 552, 76 So. 2d 727, the court distinguished the grand jury term [six months] from the petit jury term [one month] and reasoned that since trial necessarily begins before the end of the petit jury term, Article 202 merely requires an accused to raise all objections to petit jury venires before trial. In State v. Butler, 1955, 227 La. 937, 81 So. 2d 1 the accused challenged the petit jury venire because it was drawn from a jury wheel containing fewer than the 750 names required by law. The Court held that "it sufficed, . . . that the motion be filed before the trial of the case".

In their application to the Louisiana Supreme Court for writs of habeas corpus and coram nobis counsel for petitioners cited *Chianelli* and *Butler* as authority, subsequent to *Wilson*, for the timeliness of their motions. The Court in its unreported memorandum decision of September 27, 1957, rejected this view as "totally without substance" stating that *Butler* was based on *Chianelli* "which, in turn, is based" on *Wilson*, *State v. Michel*, 1954, 225 La. 1040, 74 So. 2d 207 and *State v. Labat*, 1954, 226 La. 201, 75 So. 2d 333.

[6] Louisiana Law Institute, Comments on Article 535, Projet of the Louisiana Code of Criminal Procedure.

filed November 7, 1952. The trial began February 24, 1953.

It was impossible for Poret to comply with Article 202. He was in a Tennessee penitentiary and did not return to New Orleans until October 3, 1962, long after the expiration of the term of the grand jury that had indicted him. During this period Poret had no attorney. Article 202 therefore was meaningless as to Poret. The Louisiana Supreme Court held, however, that an accused "cannot by any acts of his own extend the time provided for the filing of the motion."[7] Relying on *State v. Wilson*, the Court held that the untimely filing of the motions to quash must be treated as a waiver of objections to the grand jury.

Labat had no counsel at arraignment, January 3, 1951.[8] Two days later, the district judge appointed Mr. E. I. Mahoney as counsel to represent Labat. Thereafter the status of the case remained unchanged until January 29, 1952, when Mr. Mahoney asked and was granted leave to withdraw. Mr. G. Wray Gil, appointed in his place, contended that Labat was denied his right to effective counsel in that Mr. Mahoney was 76 or 77 years old when he took the case and was ill during several months of the year. The Louisiana Supreme Court held that the facts did not show a lack of effective counsel.[9]

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[7] State v. Labat, 1954, 226 La. 201, 75 So. 2d 333, 337.

[8] *Cf.* Hamilton v. Alabama, 1961, 368 U. S. 52, 82 S. Ct. 157, 7 L.Ed.2d 114.

[9] 75 So. 2d at 339.

The United States Supreme Court, on its first consideration of the case, also treated the motion to quash only as an attack on the *grand jury*. *Labat v. State of Louisiana* and *Poret v. State of Louisiana*, reported with and *sub. now; Michel v. State of Louisiana*, 1955, 350 U. S. 91, 76 S.Ct. 158, 100 L.Ed. 92, reh. denied 350 U. S. 955. In the majority opinion, the Court stated:

> "*Neither [defendant] made any attack on the composition of the petit jury*, but filed motions to quash their indictments claiming discrimination in the selection of the grand jury panel." 350 U. S. at 96. (Emphasis added.)

The Court held that "mere fugitive status existing here [does not excuse] a failure to resort to Louisiana's established statutory procedure available to all who wish to assert claimed constitutional rights".[10] 350 U. S. at 98. The Court accepted the findings of the Louisiana courts that Labat was represented by effective counsel.

After this rebuff, the petitioners, September 18, 1957, applied for a writ of habeas corpus in the United States District Court for the Eastern District of Louisiana. The application was based in part on newly found evidence that Howard's testimony was per-

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[10] Chief Justice Warren and Justices Black and Douglas dissented. They concluded that Poret was denied "the opportunity guaranteed by law, to challenge the constitutionality of the grand juries that indicted them." 350 U. S. at 104. They would have dismissed the indictment against both because the defendants were indicted jointly.

jured and coerced.[11] More importantly for purposes of the present discussion, the petitioners' counsel clarified their challenge to the jury system. After quoting the motion to quash, the habeas application states:

> "That Your Honor has now placed before you the fact that *objection was made to both the elimination of Negroes from Grand Jury service as well as that of the GENERAL VENIRE, to-wit, the Petit Jury.* This now presents a grave and serious question."[12] (Emphasis added.)

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[11] Howard made a sworn affidavit and later testified that his statements identifying Labat to the police and placing both Labat and Poret at the scene of the crime were a result of police pressure. In addition, one Eleanora Henderson, who had not testified at the original trial, stated that she spent the entire night of November 11, 1950, with Labat; that at 2:30 a.m. he was so drunk that she was unable to arouse him even though she rubbed ice cubes over his body; that she saw police beat and kick Labat. In the habeas proceeding Judge J. Skelly Wright, trial judge commented: "Howard appears to be a person of low mentality. Unquestionably, as the evidence shows, he has been subjected to great pressures from persons seeking to help these petitioners since his testimony in the state court. Certainly his credibility leaves much to be desired, but there is no evidence whatever, other than the statements prepared by others and signed by Howard, that Howard either committed perjury or was coerced into committing perjury. . . . . [The] credibility [of the state's principal witnesses] is unchallenged except in so far as the possibility of human error is always present in the identification of persons in the circumstances of this suit." 162 F. Supp. at 576.

[12] Continuing, counsel stated: "The point herein referred to and made the basis of an objection in the State Court and perfected in the Supreme Court of the State apparently was not pursued in the application for writs to the Supreme Court of the United States, as the Supreme Court of the United States in its opinion did make the observation that only the qualifications of the Grand Jury or jurors had been attacked, and that the objection did not go to or refer to the Petit Jury. This should have been set forth, we respectfully submit, on motion for a rehearing before the Supreme Court of the United

Because the issue as to new evidence was not raised during the trial in the state court, the district court rejected the application for failure of the petitioners to exhaust state remedies. The petitioners then submitted the two issues to the Supreme Court of Louisiana on an application for both habeas corpus and a common law writ of error coram nobis. The Court, in an unreported order accompanied by a memorandum decision, denied the writs. *State of Louisiana ex rel Poret and Labat v. Sigler*, No. 43799, September 25, 1959.[13] The petitioners applied to the United States Supreme Court for a writ of certiorari.

At the same time the petitioners were before the Louisiana Supreme Court, they carried forward their habeas proceeding in the federal courts. They appealed the district court's order and requested a stay of execution. The Fifth Circuit, September 25, 1957, in an unreported order, granted the stay but affirmed the district court. The petitioners applied to the United States Supreme Court for writs of certiorari, prohibition, and mandamus raising the issue

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States as it is counsel's humble opinion that they would have maintained the writ and discharged your defendants and/or remanded the case for a new trial *had it been pointed out that the Petit Jury had also been attacked as to the qualifications of its members*, etc. [¶] It is the law that both the Grand Jury and Petit Jury are drawn out of the same wheel, and that the wheel should at all times comprise not less than 750 names. Therefore, bringing both the Petit Jury and the Grand Jury within the same purview of the law." (Emphasis added.) Counsel also pointed to State v. Butler, 1955, 227 La. 937, 81 So. 2d 1 and State v. Chianelli, 1954, 226 La. 552, 76 So. 2d 727, as holding that a motion to quash the indictment based on a *petit jury* having been drawn from an unlawfully constituted venire may be filed at any time before trial. See footnotes 4 and 5.

[13] See footnotes 4 and 5.

of newly found evidence but also challenging the petit jury venire.

In each application to the Supreme Court, the petitioners alleged:

> "It was also discovered by the attorneys handling this matter that this Honorable Court, when it considered the prior application of petitioners (citation supra) only considered petitioners' attack on the Grand Jury of the Parish of Orleans and had failed to consider the fact that petitioners had also attacked the petit jury venire on the same grounds of systematic exclusion of Negroes from the petit jury by which they were tried."

The Supreme Court denied the writs but remanded the cause to the district court for consideration in view of the petitioners' having exhausted their state remedies. *Poret v. Sigler*, 1958, 355 U. S. 60, 78 S.Ct. 144, 2 L.Ed.2d 107.

After "in effect retr[ying] the petitioners for the offense of which they have been convicted", the district court discharged the writ. *Labat v. Sigler*, E.D. La. 1958, 162 F. Supp. 574. The district judge did not consider the issue of the exclusion of Negroes from the general venire or the petit jury venires in spite of the fact that the application clearly raised that issue as an alternate basis for relief. He simply referred to the Supreme Court's affirmance "after

granting a writ of certiorari limited to an attack on the grand jury venire". *Id.* at 574.

The Fifth Circuit affirmed the district court, again without discussing the systematic exclusion of Negroes from the jury system although that issue was raised in the briefs. *Labat v. Sigler*, 5 Cir. 1959, 267 F.2d 307. The petitioners thereupon applied to the United States Supreme Court for writs of certiorari. The petition for certiorari alleged:

> "Additionally it was urged that this Honorable Court had failed to pass on the exclusion of Negroes from petit juries in the Parish of Orleans, State of Louisiana, when this case was before this Court previously. *Michel vs. Louisiana*, 350 U. S. 91. . . . Insofar as the Motion to Quash the Petit Jury venire was concerned, as previously stated herein, a motion to quash the indictment was filed by Labat and Poret in the trial court as against the general venire and the Petit Jury."

The Supreme Court granted the writs, vacated the judgment of the Fifth Circuit, and remanded the case to the district court. *United States, ex rel Poret v. Sigler*, 1960, 361, U. S. 375, 80 S. Ct. 404, 4 L.Ed.2d 380. The case was remanded for

> "the dispostion of the question whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of petit jury panel in violation of the Federal Constitution."

B. The restrictive language of this order strongly suggests that the Supreme Court was satisfied that as to the petit jury the question of the composition of the panels was a live issue, the question of waiver a dead issue. The district court, however, relying on *Michel (Labat-Poret)*, held that the petitioners, having failed to make timely objections to the jury, "are now deemed to have waived those objections". 234 F. Supp. at 175.

The district court's error on this point and the states' frequent reliance on the doctrine of waiver in federal habeas cases demonstrates the need in this circuit for a close look at the Supreme Court's discussion of that doctrine in *Fay v. Noia*, 1963, 372 U. S. 391, 76 S.Ct. 158, 9 L.Ed.2d 387.

The "waiver" asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default. No one doubts that the state has a legitimate interest in establishing orderly procedures for filing certain pleadings *in limine*. No one questions the propriety of such a rule as to motions based on state-created rights asserted in state courts. And we are all familiar with useful legal fictions. But! The initial trouble with the doctrine is the mismatch between the relatively minor default (here, probably, as is often the case, a result of the attorney's mistake of law) and the heavy penalty of forfeiture of constitutional rights. The penalty does not fit the offense. This incongruity affects the reasonableness of the local rule. Even if strict appli-

cation of the rule were reasonable, as an appropriate means of preserving the integrity of a state's procedural system, there remains the serious question of the effect of such a rule on American federalism. Can a state—by the fictitious waiver doctrine, the exhaustion of state remedies principle, and the adequate-state-ground rule—concert a procedural default (at worst a waiver of state process) into a relinquishment of substantive federal rights? *Fay v. Noia* says "No" and severely limits the application of the doctrine when the rights at issue are federally-created or federally-guaranteed rights asserted in collateral (habeas) proceedings in the federal courts. It is true that federal habeas relief strains federal-state relations by lessening the finality of state criminal judgments. However, "conventional notions of finality in [state] criminal litigations cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for federal judicial review." 372 U. S. at 424. The "jurisdiction of the federal courts on habeas corpus is not affected by procedural defaults incurred by the applicant during the state court proceedings. . . ." 372 U. S. at 438.

Fay v. Noia marks a turning point in the history of habeas corpus, but it is not revolutionary. In *David v. Wechsler*, 1923, 263 U. S. 22, 44 S.Ct. 13, 68 L. Ed. 143, the state supreme court held that a federal officer attempting to assert a federal venue privilege was deemed to have waived the defense

by failing to make his appearance a "special" appearance under state law. In disallowing the state ground Mr. Justice Holmes, in language often quoted, said:

> "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice." 26 U. S. at 24.

To quote Justice Holmes again: "Habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings, and although every form may have been preserved opens the inquiry whether they have been more than an empty shell."[14]

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[14] This language occurs in Justice Holmes's dissenting opinion in Frank v. Mangum, 1915, 237 U. S. 309, 346, 35 S.Ct. 582, 595, 59 L. Ed. 969, 988. In *Fay v. Noia* the Court noted that the principle it expresses was adopted by the majority in Moore v. Dempsey, 1923, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543, which Justice Holmes also wrote. This Court, before and after *Fay v. Noia*, has consistently taken a jaundiced view of waiver in habeas proceedings in which the state has relied on the petitioner's failing to make a timely objection to the exclusion of Negroes from juries. United States ex rel Goldsby v. Harpole, 5 Cir. 1958, 263 F.2d 71, cert. denied, 361 U. S. 838, 80 S. Ct. 58, 4 L.Ed.2d 78; United States ex rel Seals v. Wiman, 5 Cir. 1962, 304 F.2d 53, cert. denied, 372 U. S. 915, 83 S. Ct. 717, 9 L.Ed.2d 722; Whitus v. Balkcom, 5 Cir. 1964, 333 F.2d 496, cert. denied, 379 U. S. 931, 85 S. Ct. 329, 13 L.Ed.2d 343; Cobb v. Balkcom, 5 Cir. 1964, 339 F.2d 95. See also Whippler v. Balkcom, 5 Cir. 1965, 342 F.2d 388. In *Goldsby* the defendant's retained counsel without consulting the defendant, failed to claim systematic exclusion of Negroes from the jury during the trial or on appeal to the state supreme court. We held that the defendant had not waived his right with respect to the trial jury. In *Seals* counsel made no objection before or during trial to the composition of either the grand jury or the trial jury. There was a plus fact in that the evidence of systematic

The doctrine of waiver, as applied to forfeiture resulting from a procedural default, rests on three principles. (1) Failure to object or to make a timely objection based on federal rights constitutes constructive waiver of the objection and therefore of the federal rights. (2) Failure to object or to make a timely objection violates the principle that a habeas applicant is not entitled to federal relief until he has exhausted the state's remedies. (3) Forfeiture of rights for a procedural default in accordance with a neutral state law is an adequate, independent, non-federal ground for the defendant's conviction. "If exhaustion is interpreted to include presently unavailable remedies, it would appear that the waiver and adequate-state-ground rules are merely semantic variants of the exhaustion requirement."[15]

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exclusion was not known and not easily ascertainable. We held that Seals had not waived his constitutional rights to either jury. In *Whitus* the defendant's counsel decided not to raise the issue as to the trial jury because of the fear that if he did so community hostility would jeopardize his case with the jury. We held that there was no waiver where the only choice was Hobson's choice. In *Cobb* the attorney did not discuss with a young and inexperienced defendant the question of the systematic exclusion of Negroes from the grand and trial juries. Georgia courts have a firm rule that the failure to make a timely constitutional objection constitutes a waiver of the objection. "In sum", Judge Bell said, "there was no intentional relinquishment of a known right within the purview of the majority opinion in *Fay v. Noia*. . . ." 339 F.2d at 102.

[15] Sofaer, Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L. Rev. 78, 82 (1964). *Cf.* "Where the state [procedural] rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate non-federal ground doctrine in the vast majority of cases." Henry v. Mississippi, 1965, 379 U. S. 443, 448, n. 2, 85 S. Ct. 564, 567, 13 L.Ed.2d 408, 413.

A number of excellent articles discuss federal habeas as a post-conviction remedy for state prisoners: Note, The Freedom Writ—The Expanding Use of Federal Habeas Corpus, 61 Harv. L. Rev. 657 (1948);

First, in *Fay v. Noia* the Court narrowed fictitious waiver to the vanishing point. An "intentional relinquishment or abandonment of a known right or privilege", the "classic waiver" enunciated in *Johnson v. Zerbst*, 1938, 304 U. S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461, "furnishes the controlling standard". 372 U. S. at 439. The "limited discretion in the federal judge to deny relief . . . to an applicant who deliberately by-passed the orderly procedure of the state courts and in so doing has forfeited his state court remedies . . ." is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus." 372 U. S. at 438-9. There must be a showing that the petitioner "after consultation with competent counsel, or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts. . . . [T]he standard here put forth depends on the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by the federal courts on habeas, for

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Hart, Foreword, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84 101-121 (1959); Bator, Finality in Criminal Law and Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423 (1961); Reitz, Federal Habeas Corpus: Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961); Reitz, Federal Habeas Corpus: Post-Conviction Remedy for State Prisoners, 108 U. Pa. L. Rev. 461 (1960); Meador, The Impact of Federal Habeas Corpus on State Trial Procedures, 52 Va. L. Rev. 286 (1966). Hill, The inadequate State Ground, 65 Colum. L. Rev. 943 (1965). Cole and Small, Note: State Post-Conviction Remedies and Federal Habeas Corpus, 40 N.Y.U.L. Rev. 154 (1965). See also Sandalow, Henry v. Mississippi and the Adequate State Ground, 1965 S. Ct. Rev. 187.

waiver affecting federal rights is a federal question." 372 U. S. at 439. On the facts, *Fay v. Noia* is a strong case, for the decision not to appeal was made by Noia personally, after consultation with his counsel. The Supreme Court held that Noia had not deliberately by-passed state procedural law, because he was faced with the "grisly choice" of not appealing or of appealing, succeeding on appeal, and running the risk of a heavier sentence. "Each case must stand on its facts." 372 U. S. at 440.

Second, *Fay v. Noia* recognized that while "comity demands that the state courts . . . should be appealed to in the first instance", if a petitioner's constitutional rights are denied "his remedy in the Federal Court will remain unimpaired". 372 U. S. at 418, 419. The rule of exhaustion is "not one defining power but one which relates to the appropriate exercise of power . . . else a rule of timing would become a rule circumscribing the power of federal courts on habeas, in defiance of unmistakable congressional intent". 372 U. S. at 420. Accordingly, the Court held that "§2254 is limited in its application to failure to exhaust state remedies still open to the habeas applicant at the time he files his application in federal court." 372 U. S. at 435.

Third, the Court recognized that it had often declined to "review state court judgments which rest on independent and adequate state grounds, notwithstanding the presence of federal grounds", but held that "the adequate-state-ground rule is a function of

the limitations of *appellate* review" (Court's emphasis.) 372 U. S. at 429. The "appellate function is concerned only with the judgments or decrees of state courts, the habeas corpus jurisdiction of the lower federal courts is not so confined. The jurisdictional prerequisite is not the judgment of a state court but detention simplicited". 372 U. S. at 430. "In Noia's case the only relevant substantive law is federal—the Fourteenth Amendment. State law appears only in the procedural framework for adjudicating the substantive federal question. The paramount interest is federal." 372 U. S. at 431. "The breath of the federal courts' power of independent adjudication on habeas corpus stems from the very nature of the writ. . . . The nature of the writ at common law, the language and purpose of the Act of February 5, 1867,[16] and the course of decisions" for a hundred years are "irreconciliable" with the view that the federal courts' habeas jurisdiction may be "defeated by [some]thing that may occur in the State court proceedings. State procedural rules plainly must yield to this overriding policy". 372 U. S. at 426.

There are exceptional circumstances in this case. (1) The filing of the motions three and a half months before the trial gave the state sufficient notice to remove any question of the state's having been prejudiced by the default. (2) Literal compliance was impossible for Poret; he had no attorney who could

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[16] Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385. This act expanded habeas jurisdiction of federal courts to include "all cases where any person may be restrained his or her liberty in violation of the constitution, of any treaty or law of the United States;" that is, state prisoners asserting federal rights.

have filed a timely motion. As for Labat, the default may have been caused by the inadvertence or mistake of an ill and aged court-appointed attorney.[17]

(3) At the time the motions were filed, no one could say with certainty what the Louisiana law was as to the proper time for filing motions challenging the petit jury and the general venire; most commentators considered that the motion could be filed at any time before the trial.[18] We disregard these and other exceptional circumstances. Under *Fay v. Noia* such plus factors have no relevance, in the absence of a contention that petitioners abused state processes by deliberately by-passing a known procedural requirement.[19] *Fay v. Noia* preserves the petitioners' objections to the Orleans Parish jury system—the general venire, the grand jury, the petit jury. We hold that, absent an intentional relinquishment of a known right and absent deliberate by-passing of a known procedural requirement, a procedural default in a state court, such as failing to make a timely challenge to the jury system, does not bar the petitioner's right to assert the challenge in a federal habeas proceeding.

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[17] "Of course, any civilized system of judicial administration should have enough looseness in the joints to avert gross denials of a litigant's rights growing out of his lawyer's mistake or even negligence in failing to file the proper kind of pleading at precisely the prescribed moment." Berman v. United States, 1964, 378 U.S. 530, 538, 84 S. Ct. 1895, 12 L. Ed. 2d 1012, 1017.

[18] See footnotes 4 and 5.

[19] The defendant's "deliberate by-passing of State procedures" is "the only ground for which relief may be denied in federal habeas for failure to raise a federal constitutional claim in the state courts". Jackson v. Denno, 1964, 378 U.S. 368, 370, n. 1, 84 S. Ct. 1774, 12 L.Ed.2d 908.

The untimeliness of the petitioners' challenge to the jury system in Orleans Parish and the Louisiana courts' holding that this untimeliness constituted a "waiver" of the challenge have bearing here only to show that the petitioners exhausted their state remedies and did not intentionally by-pass state process. The Supreme Court's affirmance in *Michel (Labat-Poret)* of the Louisiana courts' holding that the petitioners "waived" their objections to the grand jury is limited by the fact that the Supreme Court made this holding in the exercise of its appellate functions on a direct review of the Louisiana judgments. *Fay v. Noia* rescued the grand jury issue squarely raised but not decided in this habeas proceeding.

Federal habeas relief for unlawfully detained state prisoners is part and parcel of the Supremacy Clause.[20] State courts cannot expect to have the last say on a local procedural rule that defeats or dilutes an accused's federal constitutional right to trial by an impartial jury.

II.

A. Seven hundred and fifty years ago Magna Carta declared, "No free man shall be . . . im-

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[20] "Insofar as this [habeas] jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than state law." Mr. Justice Frankfurter in Daniels v. Allen, *decided sub.nom.* Brown v. Allen, 1953, 344 U.S. 443, 510, 73 S. Ct. 397, 97 L. Ed. 469.

prisoned . . . or in any way destroyed, except by the lawful judgment of his peers or [and] by the law of the land."[21] By Blackstone's time, *judicium parium*, the privilege King John granted his vassals at Runnymeade, was linked, erroneously but indissolubly, with the "right of trial by jury, or the country, *per patriam*, . . . that trial by the peers of every Englishman".[22] "The very idea of a jury", the Supreme Court has said, "is a body of men composed of the peers or equals of the persons whose rights it is selected or summoned to determine; that is, of his neighbors, fellows, associates, persons having the same legal status as that which he holds". *Strauder v. West Virginia*, 1879, 100 U. S. 303, 25 L. Ed. 664. The importance of the right to a jury of one's peers extends beyond any individual defendant: "for racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 1940, 311 U. S. 128, 130, 61 S. Ct. 164, 85 L. Ed. 84.

B. In the interest of achieving uniformity in decisions on the exclusion of Negroes from juries, this Court sat en banc on *Labat-Poret* and six other

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[21] Chap. 39. The "peers of a Crown tenant were his fellow Crown tenants". McKechnie, Magna Carta, 379 (2d Ed.). "The idea that a vassal should be judged by his peers is an integral part of the feudal ideal of society." Keeney, Judgment by Peers, 110 (1952).

[22] Blackstone, Commentaries, Bk. IV, Chap. xxvii, 349 (Tucker 1803).

cases[23] involving similar contentions. Two of those cases also involved jury systems in Louisiana. In *Scott v. Walker*, 5 Cir. 1966, 358 F.2d 561, a Negro, under sentence of death for rape, charged that Negroes were excluded from petit juries in Livingston Parish. In *Davis v. Davis*, 5 Cir. 1966, ... F.2d . . . ., a Negro, under sentence of death for the murder of a white police officer, charged that Negroes were excluded from the jury system in Acadia Parish. In each case this Court found that the petitioner had made a prima facie case, chiefly on the great disparity between the percentage of Negroes in the parish and the percentage of Negroes shown to have been included on the general venires. In each case the state failed to furnish a constitutionally acceptable explanation for the disparity. Accordingly, this Court set aside the convictions and remanded the cases with directions that the district court issue the writs releasing the prisoners, subject, of course, to retrial of the petitioners by the state.

Scott v. Walker lays down valuable guidelines in this difficult area of the law:

> "The first is that the systematic exclusion of Negroes from juries in judicial districts where Negroes represent a substantial part of the population constitutes a deprivation of

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[23] Scott v. Walker, 5 Cir. 1966, 358 F. 2d 561; Billingsley v. Clayton, 5 Cir. 1966, 359 F.2d 13; Davis v. Davis, 5 Cir. 1966, F.2d (No. 21976), , 1966); Rabinowitz v. United States, 5 Cir. 1966, F.2d (No. 21258, , 1966); Jackson v. United States, 5 Cir. 1966, F.2d (No. 21345, , 1966); Brooks v. Beto, 5 Cir. 1966, F.2d (No. 22809, , 1966).

equal protection under the Fourteenth Amendment. *Patton v. Mississippi*, 332 U. S. 463, where the Supreme Court said, 'When a jury selection plan, whatever it is, operates in such a way as always to result in the complete and long continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand.' 332 U. S. 463, 469. The second proposition which is equally clear is that the inclusion of a minimal or token number of Negroes on a jury list does not prevent the systematic exclusion rule from operating, for the Supreme Court has said in *Brown v. Allen*, 344 U. S. 443: 'Of course, token summoning of Negroes for jury service does not comply with equal protection, *Smith v. Texas*, 311 U. S. 129.' See also *United States ex rel Willie Seals, Jr. v. Wiman*, 5 Cir. 304 F.2d 53, 67. A further proposition, not in dispute, is that the Constitution does not require an exact proportion between the percentage of Negroes in the population and the percentage of Negroes on the jury lists, nor does the Constitution require that any particular panel of jurors in a criminal trial include members of the race of the accused person. *Swain v. Alabama*, 380 U. S. 202. Finally, it is also clear that there is a burden of proof upon the petitioner in a habeas corpus proceeding to establish sufficient facts to warrant a finding

of denial of his constitutional rights. *Swain v. Alabama, supra.*"

The Supreme Court has held that the "indisputable fact that no Negro had *served* on a criminal court *grand* or *petit jury* for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. . . . [imposing] a duty [on] the State to try to justify such an exclusion as having been brought about for some reason other than racial discrimination". *Patton v. Mississippi*, 1947, 332 U. S. 463, 466, 68 S. Ct. 184, 92 L. Ed. 76. (Emphasis added.) Testimony of a jury commissioner that he had "never known of a single instance where any Negro sat on a grand or petit jury in the entire history" of the country "in itself made out a prima facie case of the denial of equal protection". *Norris v. Alabama*, 1934, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074. See also *Hernandez v. Texas*, 1954, 347 U.S. 475, 74 S.Ct. 667, 98 L.Ed. 866.

In a transistionary period where jury commissioners are moving, but moving slowly, toward a nondiscriminatory system of selecting a cross-section of the community, sophisticated methods of token inclusion of Negroes on venires have increased the defendants' burden of proving a prima facie case of systematic exclusion. When Negro representation on venire lists is not extremely disproportionate to the Negro population in the parish, the burden may be a heavy one. See *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 825, 829-30, 13 L.Ed.2d 759; Note, 75 Yale L. J. 322, 326. But, as this Court has said,

"very decided variations in proportions of Negroes and white on jury lists from racial proportions in the population, which variations are not explained and are long continued, furnish sufficient evidence of systematic exclusion of Negroes from jury service." *United States ex rel Seals v. Wiman*, 1962, 5 Cir. 304 F.2d 53, 67. *Swain* is not inconsistent with the views expressed in *Seals*. In *Swain* the Court specifically approved the inference of discrimination drawn in *Patton v. Norris* as "determinative absent sufficient rebuttal evidence". The Court simply rejected "woodenly" application of "this rule of proof . . . to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service". 380 U.S. at 227. In *Swain* the Court noted that "Negroes served on 80% of the grand juries selected, the number ranging from one to three". 380 U.S. at 205.

C. The approach developed in *Scott v. Walker*, *Davis v. Davis*, and other jury exclusion cases requires close scrutiny of the statutory procedures for jury selection and the actual practices of the jury commissioners.

Under the law as it existed at the time Labat and Poret were indicted and tried, the Orleans Parish Jury Commission consisted of three commissioners appointed by the Governor for a four year term.[24] In Orleans Parish there has never been a

[24] Under the law, the jury system in Orleans Parish differs in certain respects from the system used in other parishes. For example, instead of a general venire of 750 names in a "jury wheel", and a proposed petit jury venire of 150, other parishes have a general venire of 300 names in a jury box and a proposed petit jury venire of 30 to 100. *Cf.* LSA-R.S. 15:175-189 with 15:191-203. See Scott v. Walker, 358 F.2d at 563.

Negro jury commissioner. And the Commission has never employed a Negro. Compare *Brooks v. Beto*, 5 Cir. 1966, ... F.2d . . . .

The Commission must maintain a "jury wheel" (general venire) at all times filled with the names of at least 750 prospective jurors. From the wheel the grand jury venire is selected and the petit jury venires are drawn at random.[25]

In the selection of names for the jury wheel, the commissioners' clerical staff culls from the city directory[26] names of persons who have never served

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[25] "LSA-RS 15:194: *Selection of jurors; preparation, preservation and supplementing of jury list*

The said commissioners shall select at large, impartially, from the citizens of the Parish of Orleans having the qualifications requisite to register as voters, the names of not less than seven hundred and fifty persons competent under this Code to serve as jurors. A list of these names shall be prepared, certified to by the commissioners, and kept as a part of the records of their office subject to the orders of the judges of the criminal district court of said parish. The names on said list shall be copied on slips prepared for the purpose, with the number and address corresponding to that on the lists and shall be placed in the jury wheel from which the drawing is to be made. No name shall be canceled from said lists or withdrawn from the jury wheel without an order of court, and the said list shall be a correct and perfect record of the names in the jury wheel. The said list shall be supplemented from time to time as the necessities of jury service may require. No drawing shall be made from a list of less than seven hundred and fifty (750) names, unless in an extraordinary case when tales jurors are ordered by one of the judges of the criminal district court, said judge may, in his discretion, in order to avoid delay, order said drawings from a list and jury wheel containing not less than five hundred (500) names, and in such cases it shall be the duty of said commissioners immediately after said drawing to refill the said wheel and complete said list so as to reach the required number of seven hundred and fifty (750) names."

[26] The Commission also used other sources from time to time but never consistently or extensively: the telephone directory, the voters' registration rolls (for a short while), employees of large corporations, friends and acquaintances.

as jurors. The staff does not select doctors, lawyers, school-bus drivers, and others whose occupations indicate that they would be excused from jury service by statutory exemption.[27] The staff also avoids selecting manual laborers, daily wage earners, and "outside" workers (for a convenience we include all of these in the term, "daily wage earners"), although there is no statutory authority for this practice. Thus, Mr. V. G. Warner, a jury commissioner in 1953, testified:

> "A So we went and used the City Directory also starting then and marked off indiscriminately names. As far as occupations, we found out that all of the people that were, say, carpenters, painters, welders, mechanics, shipfitters, they all—the commission found they all wanted to be excused.
>
> Q People that were laborers would want to be excused?
>
> A Because they were going to lose money. . . . [W]e would try to mark off [select for jury duty] people that looked like they were either inside workers, salaried workers, or in some kind of sales work or in executive types, something like that, where they would not be subject to lose money.
>
> A Anybody that looked like he was an inside man, in other words, that he

[27] See footnote 37 for LSA-R.S. 15:174.

> wouldn't be subject to be docked or lose money, that his firm would let him off to serve on the jury."

Mr. J. B. Murphy, Chief Supervisory Clerk of the Commission since 1943, testified:

> ". . . [The Commission would not send notices to] any truck drivers, welders, painters, shipfitters, boilermakers, except if they were working for the Government, or the State or the School Board, we didn't mark them off because we knew from past experience that it would be fruitless . . . [A) lot of people that we have marked in here looked like they were inside people, [but when] they were decided by their employees that they were hourly rated . . . they were not allowed to serve."

Jury notices are mailed to those selected as potential jurors requiring their appearance before the commissioners. When they appear, they are required to answer certain written questions on the reverse of the subpoena. In 1953 one of the questions related to the race of the prospective juror.[28] The

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[28] Mr. V. B. Warner, chairman in 1952-1953, testified that the question was to enable the staff to assemble statistics as to participation by Negroes in the jury selection process so as to aid the chairman when he testified (as he frequently did) on this question in criminal cases. This statistical material has disappeared. Apparently no attempt to assemble it as a permanent or meaningful record was ever made. The chairman testified that it existed as notes on pieces of paper kept in an employee's desk drawer.

commissioners excuse daily wage earners and those who do not meet age, residency, literacy, or other statutory qualifications.[29] The names of the qualified potential jurors are kept in an alphabetized card index which may contain as many as 40,000 names. The index forms the pool from which the commissioners select the 750 names to fill the jury wheel.

Twice a year the Commission selects from the jury wheel 75 names for the grand jury venire. These are submitted to one of the judges in the Criminal District Court, who in rotation, empanel the grand jury. The judge, usually after interviewing a substantial number of prospective grand jurors, selects twelve to serve for a six months term. LSA-R.S. 15:195.

After the grand jury venire has been selected, the Commission draws from the jury wheel at random a "*proposed [petit jury] venire*" of 150 names. Ad-

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[29] *LSA-RS 15:172 Qualifications*

The qualifications to serve as a grand juror or a petit juror in any of the courts of this state shall be as follows:

To be a citizen of this state, not less than twenty-one years of age, a bona fide resident of the parish in and for which the court is holden, for one year next preceeding such service, able to read and write the English language, not under interdiction or charged with any offense, or convicted at any time of any felony, provided that there shall be no distinction made on account of race, color or previous condition of servitude; and provided further, that the district judge shall have discretion to decide upon the competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case.

In addition to the foregoing qualifications, jurors shall be persons of well known good character and standing in the community."

ditional drawings of 150 names are made until each section of the Criminal District Court has a proposed venire of 150 prospective petit jurors. These persons are subpoenaed to appear before the judges of the Criminal District Court. Each judge then selects the "final venire" or panel of about 75 from which the petit juries are selected. The veniremen serve a term of one month. In selecting prospective jurors for this final venire (petit jury panel), the judge usually calls for volunteers. LSA-R.S. 15:196. The record does not indicate the number of Negroes who volunteer for jury duty. The judge exercises considerable discretion in determining the composition of the final venire although his statutory authority appears to be limited to determining the competency of individual jurors.[30] If daily wage earners appear and ask to be excused from the final venire because of financial hardship, the judge generally grants the request.

Judge Fred Oser of Section "C", who selected the petit jury venire furnishing the jury that tried Labat and Poret, is dead. Judge William J. O'Hara, who was on the Criminal District Court for the Parish of Orleans from 1932 to 1962, testified:

> "Well, I think the principal reason [to be excused] was what you might call hardship reasons. In other words, they had to remain on the job to get their pay or they

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[30] LSA-RS 15:192 provides: "The jury commissioners for the Parish of Orleans shall qualify all persons before their selection as jurors, but the judges of the several district courts shall have the right to decide upon the competency of jurors."

had to keep their business going or, in other words, they could not take time off from their job or their business or something else. They had families and obligations. They would present a case that it would be a hardship on these men to require them to serve.

(19) Q Was it not generally the excuse that they were wage eaerners and that if they had to serve on the jury where they didn't get paid, as in Louisiana they don't get paid, that they would miss that day's work?

A Well, we had quite a number of those excuses, yes, of that type.

Q Would you say that that was one of the largest reasons for excuse?

A Well, I guess you could say that. I am just talking generally from my recollection, but that was a very frequent sitiuation that we had to deal with. Particularly after the Wage and Hour Laws were passed by the United States Government, these people had to work so many hours and if they did not work the hours they would not get paid for it. That was probably the major number of excuses that were presented."

The Louisiana statutes relating to the jury system are not discriminatory on their face. Discrimination against Negroes comes from the administration of the system. The jury commissioners who served Or-

leans Parish in 1953 testified that they made no effort to broaden the base of the card index (the pool) by changing the methods of prior commissioners or by seeking out Negroes to compensate for the large number disqualified as daily wage earners.[31] The Commission inherited a card index that for years had succeeded in producing only white jurors on the grand jury and the petit jury in Orleans Parish. Its failure to change the system amounted to a deliberate decision to continue the systematic limitation of Negroes on the venires. This Commission policy, along with the judges' policy of excusing all daily wage earners from the jury venires, had the end effect of totally excluding Negroes from the most important stage of the system—final fact-finding by a trial jury.

D. Turning to the facts showing the operative effects of the Orleans Parish jury system, we find that many of the facts have been stipulated. There

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[31] Mr. V. G. Warner, Chairman of the Jury Commission 1952-56, testified that he did not "know of any particular effort made to get any number of Negroes in". Mr. D. Knowles, who has been on the Commission since 1952, stated that "about the only [sources of prospective jurors] were the city directory, the telephone book . . . [and] the registration office", which was "very unsatisfactory"; that the Commission never sent notices to Negro churches, or a Masonic organization or club; "we have never checked out any organization of any kind or character to send notices to." He was asked: "Has there been any attempt on the part of the Jury Commission to change its policy as to the selection of Negroes to serve on jury venires in Orleans Parish over the years . . . to increase the number of Negroes serving on the jury venire? He replied: "In the first place, we wouldn't know how to do that." Mr. Knowles admitted that the Jury Commission had never "met and decided they wanted to as a matter of policy increase the number of Negroes serving on the venire". The "method has not been changed over the years . . . it still follows the same pattern".

are also a large number of statistical reports (See Appendix) which the district court allowed in evidence and considered in reaching its findings.

The outstanding fact is that in 1953 all-white juries were invariably the rule in Orleans Parish. As Justice Black pointed out in his opinion in the first *Labat-Poret* case:

> "Only once within the memory of people living in the parish had a colored person been selected as a *grand* juror. That juror, who happened to look like a white man, was selected under the mistaken idea that he was one." 350 U.S. at 102.

At the time Labat and Poret were tried, no Negro had ever served on a *petit jury* in a criminal case in Orleans Parish.

The petitioners' counsel introduced in evidence the jury venire lists of Orleans Parish for 103 months, January 1948, to March 1953, in every section of the Orleans Parish Criminal District Court. The venire lists show a total of 20,492, of which 715 were definitely Negro, 10,816 were definitely white, and 8,958 were undetermined.

Comparison of the Negro percentage of Orleans Parish population with the Negro percentage of veniremen in the Orleans Parish Criminal District Court in itself makes a strong showing of systematic exclusion of Negroes from jury service. The 1950

census found that of a total of 570,445 residents, 182,631, or about 32 per cent were Negro.

In a sample of 8657 jurors selected during the period from January 1948 to March 1953 for the jury commissioners' proposed venires,[32] the aggregated average proportion of non-whites was 6.2 per cent; the non-white population eligible for jury duty was 25.8 per cent.[33] One could expect the proportion of Negroes on the proposed venire to vary above and below the figure of 25.8 per cent; in no instance, however, did the proportion of non-whites exceed 16.1 per cent. If attention is confined to the months immediately preceding the trial, November 1952 to March 1953, of the 1964 jurors whose race was determined only 4.9 per cent were Negro. In no one single venire was the proportion of Negroes above 9.6 per cent.

One of the stipulations states that the Jury Commissioners certified Negroes for the general venire "in numbers approximating 10% of the venire".[34] Since

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[32] The figure 8657 excludes those veniremen whose race could not be determined from the commissioners' records. A subsample of those whose race had been undetermined was checked against voter registration records. Of the 247 jurors in the subsample whose race it was possible to determine in this fashion 6.0 per cent were Negro. A subsample of those final veniremen whose race was initially undetermined included 177 of the jurors who were in the previous subsample. Only 1.7 per cent of those in this subsample were Negro.

[33] This figure takes into account the qualifications stated in LSA-R.S. 15:172 and the exemptions provided for in LSA-R.S. 15:174. It excludes women, because women do not ordinarily serve on the juries in Louisiana; they must volunteer.

[34] Stipulation 13 provides: "That although prior to February, 1953, no Negro had ever served on a petit jury empaneled to try a Negro in the Criminal District Court for the Parish of Orleans, since 1936, the Jury Commissioners had certified Negroes as qualifying under the state law in petit jury venires in numbers approximating 10% of the venire."

the final winnowing of jurors takes place when the proposed venire is reduced to the final venire, we consider that comparative figures showing white and Negro jurors should be based on the final venires. Of the 8657 proposed veniremen studied, 4094 were selected for the final venire. Of these final veniremen, 3.7 per cent were Negro. In the period from November 1952 to March 1953, the proportion of Negroes on the final venire was only 3.1 per cent. It is understandable therefore that none of the Negroes included on the final venire served on petit jury panels.

Labat and Poret were tried February 25, 1953, in Section "C" of the Criminal District Court for the Parish of Orleans. Jurors for their trial were drawn from panels furnished to Sections "C" and "E". On the proposed venire for Section "C" for February 1953, there were 150 prospective jurors, of whom 91 were white persons, one was a Negro, and 58 were of undetermined race. Of those proposed veniremen, 53 served in the final venire. Of these 53, 45 were definitely white persons, none was a Negro, and 8 were of undetermined race. There were 149 on the proposed venire furnished to Section "E". Of these, 83 were definitely white persons, 3 were Negroes, and 63 were of undetermined race. Of the proposed veniremen, 57 were selected for the final venire. Of these, 51 were white persons, none was a Negro, and 6 were of undetermined race.

The percentage of Negroes in Orleans Parish of 32 per cent compares with the percentage of Negroes

on the petit jury venires of 3.7 per cent over a five year period and 3.1 per cent for several months before the trial. In *Scott v. Walker*, we held that proof of 13 per cent Negro population and only one per cent Negro veniremen makes a prima facie case of token representation of Negroes on venire lists. In *United States ex rel Seals v. Wiman, supra*, we found "tokenism" where two per cent of veniremen were Negroes in a county where 31.7 per cent of the male population over 21 years of age was Negro. In both of these cases, the underrepresentation of Negroes on venires is only somewhat more pronounced than in the instant case. The disparity in this case is about the same as that in *Speller v. Allen*, 1953, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (reported with, and *sub. now. Brown v. Allen)*. In *Speller v. Allen*, the court noted that the jury lists were made up from county tax lists, containing 8,233 individual taxpayers, of whom 3,136 or 38 per cent were Negroes. The jury box involved contained 2,126 names, but of that number only 145 or 7 per cent were names of Negroes. The Court said, "This disparity between the races would not be acceptable by this court solely on the evidence of the clerk of the commission that he selected names of citizens of good moral character and qualified to serve as jurors and who had not paid their taxes". 344 U.S. at 481.[35]

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[35] The State rebutted the presumption by showing that the clerk relied on a "comparative wealth" standard based on the tax rolls. This standard was "unchallenged". The Court held that, "Disregarding, as we think we should, the clerk's unchallenged selections based on taxable property, there is no evidence of racial discrimination". 344 U.S. at 482.

State of Louisiana v. Dowels, No. 139,324, Criminal District Court for the Parish of Orleans, Oct. 1952 (unreported) is the only known case in which the Criminal District Court for the Parish of Orleans quashed an indictment because Negroes had been systematically excluded from parish juries. In *Dowels* Judge O'Hara, who testified in this case, *described the grand jury system in Orleans Parish at the very time Labat and Poret were indicted and tried:*

> "[N]o Negroes have served on a grand jury since 1936 when there were Negroes in the jury wheel; [and] the presence of Negroes in the jury wheel has brought no change in the continuous omission of Negroes from the grand jury in Orleans. . . . *His Honor Judge Fred Oser of Section 'C' [who presided at the trial of Labat and Poret] testified . . . That he had never selected a colored person on the grand jury; that none of those selected to be interviewed were colored;* that he had never discriminated against any venireman because of race or color in making his decision. . . . It is obvious, therefore, that the reason that no colored person has ever served on a grand jury in the sixteen years in which colored persons have been placed in the jury wheel is because no colored person has been selected by any of the judges, including the judge of this court, for such service. . . . If colored persons constantly appearing on the grand jury venire are con-

sistently eliminated from grand jury selection because of a certain standard of selection employed by officers making the selection, can it be said that colored persons have the opportunity to serve on the grand jury? . . . *Our situation in Orleans seems to be particularly vulnerable to the theory of the United States Supreme Court 'that chance and accident alone can hardly explain the continuous omission of Negroes from grand juries over a long period of time'* because we have five courts, and in the last four years six courts, selecting grand juries and the record shows that nothwithstanding the number of courts that select grand juries, and regardless of which court selects a grand jury, or when that court selects a grand jury, or how that court selects a grand jury, or how often one court or all courts have selected a grand jury, or over that period of time any court or all courts continue to select grand juries, the omission of Negroes is consistent, constant and the same. [It is] the practice of our of the six courts to select from the list of seventy-five, fifteen, twenty or twenty-five for interview, preliminary to their appointment as grand jurors, no colored person was ever among the veniremen selected for interview by any of the four courts. . . . While this court is conscious of its fallibility, it is firm in its opinion that this record in the Supreme Court of Louisiana or of the

> United States, would support no other ruling except a ruling quashing the indictment herein because of intentional and systematic exclusion of Negroes from grand juries in Orleans Parish because of race and color and in violation of the Fourteenth Amendment, inclusive of the grand jury that returned the indictment in this case, because that grand jury is not differentiated from the pattern of jury selection that consistently eliminated colored persons from grand juries. . . . It is the individual opinion of this court that the selection of grand juries in this community throughout the years has been controlled by a tradition and the general thinking of the community as a whole is under the influence of that tradition." (Emphasis added. Quoted at length by Justice Black in *Eubanks*, 356 U.S. at 588, fn. 11).

Eubanks v. Louisiana, 1958, 356 U.S. 584, 78 S.Ct. 970, 2 L.Ed.2d 991 speaks with an especially loud and clear voice on the grand jury system in Orleans Parish. The Supreme Court noted that from 1936, when the Jury Commission first started to include Negroes in the pool of potential jurors, until 1954, when Eubanks was indicted, 36 grand juries were selected in Orleans Parish. Six or more Negroes were included on each list of 75 names from which the judge selected the grand jury. The Court observed, "Yet out of the 432 jurors selected only a single Negro was chosen", and he was chosen by

mistake. 356 U.S. at 586. "Undisputed testimony also proved that a substantial number of the large Negro population in the parish were educated, registered to vote and possessed the qualifications required for jury service, all of which is emphasized by the fact that since 1936 the Commission has regularly selected Negroes for the grand jury panel. Indeed, Negroes have served on the federal grand jury in the parish for many years." 356 U.S. at 587. The Court noted that "judges now serving on the local court testified generally [as they did in this case] that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors". The Court brushed aside these "general assertions by officials of their performance of duty":

> "[We are] reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be attributable to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges. It seems clear to us that Negroes have been consistently barred from jury service because of their race." 356 U. S. at 587.

In *Patton v. Mississippi*, 1947, 332 U. S. 463, 469, 68 S. Ct. 184, 92 L. Ed. 76, a unanimous opinion, the Supreme Court declared:

> "When a jury selection plan, whatever it is, operates in such way as always to result in the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group, indictments and verdicts returned against them by juries thus selected cannot stand."

Quoting this statement in *Eubanks*, the Court said, "This is essentially the situation here." 356 U. S. at 587. Eubanks was indicted in 1954. The Orleans Parish grand jury system described in *Eubanks* and *Dowels* is the identical system challenged here. The jury commissioners responsible for the general venire at the time Eubanks was indicted were the very same persons responsible for the general venire when Labat and Poret were indicted. The district court that selected the grand jury which indicted *Eubanks* selected the grand jury which indicted Labat and Poret and selected the petit juries in *Eubanks* and *Labat-Poret*.

III.

The prima facie case the petitioners established placed a burden on the state of coming forward with rebuttal evidence and a constitutionally acceptable explanation for the facts that gave rise to the inference of discrimination. Here the state relies on general conclusionary denials and its contention that the "disproportions" which the district court found to "exist between the races on the jury panels

in Orleans Parish" resulted, not from racial discrimination but primarily from the benign practice of excusing from jury service "outside" workers, manual laborers, and earners paid daily wages, most of whom are Negroes. These persons were excused, allegedly, not because many were Negroes but because they were paid a daily wage; to force such persons to serve on a jury would subject them to an undue hardship.[36]

We find this explanation unacceptable. (A) The exclusion of daily wage earners *as a class* violates the petitioners' due process and equal protection rights to an impartial jury representing a cross-section of the community. (B) The exclusion of this large class, 47 per cent of all Negro workers in Orleans Parish, as the district judge found, discriminates against Negroes in violation of the equal

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[36] The district court found: "The testimony did show that it was quite customary for both the jury commissioners [in filling the jury wheel and selecting the proposed venire] and the judge [in selecting the final venire] to excuse from jury duty persons particularly who were engaged in common labor for a living. Jurors are not paid any fees in Orleans Parish, and consequently, in many cases, serving on a jury, either a grand jury or a petit jury, would constitute a real hardship to a person of limited means and income. Thus, there were probably more common laborers excused from jury duty for this reason than any other class of people. However, there is no indication of any kind in this record that in granting excuses to common laborers any distinction whatsoever was made between excuses granted to Negroes who were common laborers and whites who were common laborers. The testimony shows that in the great majority of cases, it was the prospective juror himself who requested the relief from jury duty rather than the relief being instigated or suggested by the judge or the jury commissioner. Whenever the judge or the jury commissioners felt that it would be a real hardship, and particularly a financial hardship, for a person to serve as a juryman, his request for excuse from jury duty was seriously considered and generally granted."

protection clause in that the class contains a disproportionately large number of Negroes. (C) Contrary to the district court's holding, there is no Louisiana statutory authority permitting jury selection officials to exempt daily wage earners *as a class.*

A. Jury service is a burden on all who serve. And of course it falls most heavily upon daily wage earners. But this segment of the community is so large and so important that a jury system without daily wage earners simply is not representative of the community. "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Smith v. Texas*, 1940, 311 U.S. 128, 130, 61 S.Ct. 164, 85 L.Ed. 84. "[T]he proper functioning of the jury system, and, indeed, our democracy itself, requires that the jury be a 'body truly representative of the community', and not the organ of any special group or class. If that requirement is observed, the officials charged with choosing federal jurors may exercise some discretion to the end that competent jurors may be called. But they must not allow the desire for competent jurors to lead them into selections which do not comport with the concept of the jury as a cross-section of the community." *Glasser v. United States*, 1941, 315 U.S. 60, 86, 62 S.Ct. 457, 86 L.Ed. 680. *Smith v. Texas* dealt with the jury system in state courts, *Glasser* with the system in federal courts.

The overriding consideration in establishing a jury system is not the burden of jury service on pro-

spective jurors but the fairness of the system. The two considerations may be accommodated by exemption of certain occupational groups, for example, doctors and firemen; the good of the community requires that their services not be interrupted by jury duty. But the policy determination of what constitutes a proper cross-section of the community is a matter for the legislature—at least in the first instance. Here, the Louisiana legislature settled the question when it omitted daily wage earners from its list of groups exempt from jury duty.[37]

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[37] "§ *174. Persons exempt from jury service*

The following persons shall be exempt from serving as grand or petit jurors, but the exemption shall be personal to them and when they do not themselves claim exemption, it shall not be sufficient cause for challenging any person exempt under the provisions of this article:

(1) The members, the officers, and the clerks of the legislature, during the session of the legislature and in going and returning from the same.

(2) The governor, lieutenant-governor, state auditor, state treasurer, secretary of state, superintendent of public education, their clerks and employees.

(3) Judges and active officers of the several courts of this state, attorneys-at-law, physicians, surgeons, and dentists actively engaged in the practice of their profession and duly licensed under the laws of this state, professors and school teachers, school bus drivers, apothecaries, and all members of paid fire departments and all commercial travelers, residing in the state who are actually engaged in traveling, for themselves or in the interest of wholesale dealers, commission merchants or manufacturers.

(4) All persons over sixty-five years of age, those who from sickness or other physical infirmity may be incapacitated from rendering such service, and those who have served as grand jurors under the provisions of this article during the previous six months, and those who have served as petit jurors as herein provided, who shall not again be called as jurors until after the expiration of one year from the date of their service.

(5) All telegraph and telephone operators and railroad station agents. Also chief engineers of electric and water works systems."

The breadth of this Orleans Parish policy of excluding wage earners reflects its arbitrariness. *Not* just manual laborers are excluded; in addition, "outside" workers such as truck-drivers and service employees and such workers as carpenters, painters, welders, mechanics, shipfitters, boiler-makers, and plasterers are excluded. Even if it could be assumed that there is a relationship between manual laborers, a class containing a disproportionately large number of illiterates, and incompetency for jury service, such an assumption cannot be applied to outside workers and skilled workers. The fact is, however:

> "Jury competence is not limited to those who earn their livelihood on other than a daily basis. One who is paid $3 a day may be as fully competent as one who is paid $30 a week or $300 a month. In other words the pay period of a particular individual is completely irrelevant to his eligibility and capacity to serve as a juror."[38]

There is no dispute as to the policy of the jury selection officials in Orleans Parish, commissioners and judges: it was one of *systematic total* exclusion of daily wage earners as a *class*. In this respect the case differs materially from *Fay v. New York*, 1947, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 and *United States v. Flynn*, 2 Cir. 1954, 216 F.2d 354, relied upon by the district court.[39] The court in those cases

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[38] Thiel v. Southern Pacific Co., 328 U.S. at 223.

[39] In *Fay* the defendants challenged a "blue ribbon" jury as used under a special jury law of New York. The Court said that the "uncontradicted evidence is that no person was excluded because of his

accepted the principle that a jury should represent a cross-section of the community but found that the defendants' statistics did not prove a policy or "formal method" of total or systematic exclusion of laborers *(Fay)* and of Negroes, Puerto Ricans, and laborers *(Flynn)*. Cf. *United States v. Bove*, 2 Cir. 1966, 360 F.2d 1, 7.

Thiel v. Southern Pacific Co., 1946, 328 U.S. 217, 66 S.Ct. 984, 90 L. Ed. 1183, involved a total exclusion similar to the systematic exclusion of daily wage earners in Orleans Parish. A federal jury commissioner and clerk of court testified, as the commis-

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occupation or economic status". 332 U.S. at 291. The Court also noted that Fay reported a net taxable income of over $65,000 for the years 1940 to 1942 and Bove over $30,000. This showing did "not identify them very closely with the viewpoint of the depressed classes". The group with which they were most closely identified was organized labor, but it could not be claimed that union members were excluded from the panel." 332 U.S. at 293. In *Flynn* the Court found that the "appellants' own proof demonstrates quite readily that random notice distribution, coupled with legitimate qualifications standards, [had] operated to produce the very disproportions of which they complain". 216 F.2d at 384. Unlike the Louisiana statute, 28 U.S.C. § 1863 provides that "Any class or group of persons may, for the public interest, be excluded from the jury panel or excused from service as jurors by order of a district judge based on a finding that such jury service would entail undue hardship, extreme inconvenience. . . ." See United States v. Brandt, N.D.Ohio 1955, 139 F. Supp. 349 in which the Court discussed *Fay*, *Flynn*, and *Thiel* and distinguished *Thiel* on the ground that the "issue decided in *Thiel* was that the total exclusion of wage earners by jury officials was unlawful." 139 F.2d at 354. In State v. Krieger, 1947, 212 La. 527, 33 So.2d 58 the chief clerk of the New Orleans Department of Public Property was charged with forgery of checks made payable to persons placed on the garbage pay-roll account. He challenged the jury venire on the ground that white manual laborers were systematically excluded from the proposed petit jury venire of 150 for October 1946. The Supreme Court affirmed the district court's finding that the evidence did not show systematic exclusion of white manual laborers.

sioners testified here, that they "intentionally excluded from the jury lists all persons who work for a daily wage". 328 U.S. at 221: The clerk stated that he and the commissioner, as in this case, "generally used the city directory as a source of names of prospective jurors. . . . [when] a juror is called into court on a venire and says that he is working for $10 a day and cannot afford to work for four [dollars], the Judge has never made one of those men serve, and so in order to avoid putting names of people in who I know won't become jurors in the court, won't qualify as jurors in this court, I do leave them out". The "jury commissioner corroborated this testimony, adding that he purposely excluded 'all the iron craft, bricklayers, carpenters, and machinists' because these men came into court and offered that [financial hardship] as an excuse, and the judge usually let them go". The Supreme Court ordered a new trial "by a jury drawn from a panel properly and fairly chosen." The Court said in *Thiel:*

> "Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. . . . This exclusion of all those who earn a daily

> wage cannot be justified by Federal *or state law.* Certainly nothing in the federal statutes warrants such an exclusion. *And the California statutes are equally devoid of justification for the practice.* . . . Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We would breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do. . . ." 328 U. S. at 220, 222, 223, 224.

The Supreme Court rested *Thiel* on its supervisory power, perhaps because it was unnecessary to rest it on the Constitution or perhaps to point the way for state courts.[40] Nevertheless, *Thiel* is a strong

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[40] It has been suggested that the Supreme Court's supervisory power enables it to "reconcil[e] the conflicting desires of the federal judiciary to improve standards for the protection of individual rights while exercising the self-restraint appropriate to constitutional adjudication and the delicate balances of the federal system". Note, the Supervisory Power of the Federal Courts, 76 Harv. L.Rev. 1656, 1666 (1963). The Court also exercised its supervisory power in Ballard v. United States, 1946, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed. 181. Citing *Thiel*, the Court held that the systematic exclusion of women from

case for petitioners. It was a civil case with no racial overtones. Moreover, there were five members of the laboring class on the particular jury that decided the factual issues. The Court's decision to exercise its supervisory powers is certainly not inconsistent with recognition of the exclusion of wage earners as unconstitutional. In *Brown v. Allen*, 344 U. S. 443, 479, 73 S.Ct. 397, 97 L. Ed. 469, the Court said: "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper sources of jury lists, *so long as the source reasonably* reflects a cross-section of the population suitable in character and intelligence for that civic duty."

The equal protection and the due process clauses of the Fourteenth Amendment merge in this case.

The equal protection clause prohibits a state from making arbitrary and unreasonable classifications.[41] Exemption of daily wage earners *as a class* is an

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federal jury panels was an improper departure from statutory standards, because all-male panels do not represent a cross-section of the community. As in *Thiel*, the Court's language seems to extend the holding beyond the mere application of supervisory power. For example, "The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of the court". 329 U.S. at 195. This is the language of Smith v. Texas, 311 U.S. 128 and Strouder v. West Virginia, U.S. 303.

[41] Morey v. Doud, 1957, 354 U.S. 457, 463-67, 77 S.Ct. 1344, 1 L.Ed.2d 485; Yick Wo v. Hopkins, 1886, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220; Eastman v. Yellow Cab Co., 7 Cir. 1949, 173 F.2d 874, 881; Huang-Thio, Equal Protection and Rational Classification, 1963 Pub. L. 412.

unreasonable classification. (1) Their economic standing has, as *Thiel* teaches, no relationship to their competency as jurors. (2) As demonstrated by the Louisiana legislature's omission of daily wage earners from its list of groups exempt from jury duty, the community's need for their services as jurors is greater than its need for their uninterrupted services as workers and outweighs the financial hardships attached to jury duty. (3) Daily wage earners form such an extremely large definable segment of the community, 47 per cent of all Negro workers, that their exemption as a class would nullify any prospect of having jury venires representative of a cross-section of the community.

This exclusion also goes "to the fairness of the trial". The "very integrity of the fact-finding process"[42] depends on impartial venires representative of the community as a whole. The undermining of the jury system's fact-finding process, the opportunity for unfairness, the risk that defendants who may be daily wage earners will be prejudiced by exclusion of jurors in the same class are dangers which would compel condemnation of the practice without the necessity of the court's finding actual prejudice affecting the outcome of the case. In this situation, as in the straight-out exclusion of Negroes, "the degree of prejudice can never be known".[43]

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[42] Linkletter v. Walker, 1965, 381 U.S. 618, 639, 85 S.Ct. 1731, 14 L.Ed.2d 601.

[43] Hamilton v. Alabama, 1961, 368 U.S. 52, 55, 82 S.Ct. 157, 7 L.Ed.2d 114. In the racial *exclusion* cases relief has been granted without proof of actual prejudice to the defendant. Pierre v. Louisiana, 1939, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757; Strouder v. West

Nevertheless, the exclusion clearly prejudices defendants who are daily wage earners or Negroes and doubly prejudices defendants who are Negro daily wage earners. Unlike *United States v. Flynn*, the formal method of selecting jurors contained constitutional flaws.

The Court of Appeals of Georgia, while recognizing that the United States Supreme Court relied on its supervisory powers in *Thiel*, interpreted that decision in terms of the due process and equal protection clauses of the Fourteenth Amendment. In *Allen v. State*, 1964, 110 Ga. App. 56, 137 S.E.2d 711, the Court held that a *white* civil rights worker was depriyed of due process and denied equal protection of the law by a jury system that excluded Negroes from jury panels. The Court said, in *Allen:*

> "We are of the opinion that any system that results in the consistent selection of jurors from a group or portion only of those available for service in that office, rather than from those available without discrimination, does not accord to any defendant the type of jury to which the law entitles him. 'The equal protection clause of the Fourteenth Amendment prohibits a state from convicting any person by use of a jury which is not impartially drawn from a

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Virginia, 1879, 100 U.S. 303, 309, 25 L.Ed. 664. See Allen v. State, Ga.Ct.App. 1964 indicating that a defendant is entitled to a jury fairly selected from a cross-section of the community regardless of whether he is a member of the class discriminated against.

> cross-section of the community.' *Fay v. New York*, 332 U. S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043 (Dissenting opinion) . . . But when a State uses a grand and trial jury the accused is entitled to those procedures which will insure, so far as possible, that the juries selected are fair and impartial. . . . When a State law provides for indictment and trial by a jury, due process of law, in our opinion, includes indictment and trial by juries selected in accordance with the established law, from a list of citizens representing a cross section of the community." *Allen v. State*, 1964, 137 S.E.2d at 715-717.

Two recent Maryland decisions bear on the question whether a state's good intentions may justify systematic exclusion of a class from the jury system. Maryland has always required jurors to show their belief in the existence of God. The effect, of course, was to exclude non-believers. In *State v. Madison*, 1965, 240 Md. 265, 213 A.2d 880, 885, the Court held, "The exclusionary practice resulting in a failure to represent a cross-section is condemned by the [due process and equal protection clauses] of the Fourteenth Amendment". The Court cited with approval *Allen v. State*. In *Madison*, the challenge came from a defendant who, as a member of the Apostolic faith, believed in the existence of God. In *Schowgurow v. State*, 1965, 240 Md. 121, 213 A.2d 475 the Court reached the same result on a challenge to the jury system by a Buddhist.

B. A benign and theoretically neutral principle loses its odor of sanctity when it fails to function neutrally. The effect of the exclusion of daily wage earners was to deprive the defendants of a jury of their economic and social peers. But it was much more. The disqualification of all daily wage earners, as it was obviously bound to do, disqualified far more Negroes than whites and, in final analysis, operated to exclude all but a token number of Negroes from the venires.

The 1950 census records for Orleans Parish show that all *male laborers* over fourteen years of age, excluding mine and farm laborers, totaled 19,014, of whom 13,556 were Negroes and 5,458 were whites.[44] The census records also show that there were 141,141 white males over fourteen in Orleans Parish and 58,313 Negro males over fourteen. Disregarding exclusion for good cause, if all male laborers as a class had been successfully excludedfrom jury service 22 per cent of the Negroes but only 3.8 per cent of the whites would have been excluded from jury service in the parish.

These figures are on the low side, for they refer only to male "laborers". The excluded class covered not only laborers but outside workers, artisans and, indeed, every person on a daily wage. The district court found that:

> "Approximately thirty-seven per cent of the Negro work force in New Orleans were com-

[44] The census figures for male laborers are only for those over fourteen years of age.

> mon laborers and approximately ten per cent of the total Negro work force were craftsmen such as bakers, blacksmiths, construction machinery operators, etc. Thus it will be seen that a large number of Negro prospective jurors would logically and necessarily be excused from jury duty in the regular administration of the State laws pertaining to the selection of juries, and this, without any systematic discrimination of any kind." *United States ex rel Poret and Labat*, E.D. La. 1964, 234 F. Supp. 171, 178-179.

Thus, 47 per cent of all Negro workers in New Orleans were excluded from the jury system.

It is common knowledge in New Orleans and certainly the Orleans Parish Jury Commissioners know that the systematic exclusion of daily wage earners from jury service must result in a disproportionately small number of Negroes in the jury wheel and in the final venires. The exclusion operates on several levels. First, the jury commissioners, using the city directory listing occupations, excluded all daily wage earners from the jury pool that is the source of names for the jury wheel, the general venire, thereby radically reducing the number of Negroes that might be drawn for the proposed venires. At the next level, if any daily wage earners show up on the proposed venires the district judges exclude these survivors from the final venires. The system inexorably operates to discriminate against all daily

wage earners, but particularly against Negro wage earners.

The system was neutral, principled. and—foolproof: No Negro ever sat on a grand jury or a trial jury in Orleans Parish.

Nine years before Labat and Poret were tried, the Supreme Court of Louisiana put all of the state's jury commissioners on notice that they were under "a duty placed upon them by the constitutional provisions in question as construed and applied by the highest court in our land" that the complaint in the exclusion cases was "not with our [jury] statute which prohibits distinction on account of race or color but with the practical administration of the law. . . ." *State v. Anderson*, 1949, 205 La. 710, 18 So. 2d 33. In that case the Court noted that the Negro population of Allen Parish was only 10 to 20 per cent of the population of Allen Parish, "and considerably less than that percentage could qualify for jury service". "Never in the thirty-one years of the parish's history had a Negro ever served on a grand or petit jury." The court held that the commissioners had therefore "failed" in their duty; that "this evidence established a prima facie case" not rebutted by "general statements by the jury commissioners, the clerk of court, the sheriff and the registrar of voters" who "denied that they had discriminated against Negroes."

The failure of the jury commissioners to take any action to compensate for the exclusion of Negro

wage earners by seeking out additional names of potential jurors raises an inference of purposeful discrimination.[45] As Judge O'Hara pointed out in *Dowels*, Orleans parish had a "large colored population . . . with . . . many of them qualified for grand jury service". Here the parties stipulated essentially what Judge O'Hara found as a fact in 1952:

> "That the public schools of the Parish of Orleans between the years 1943 and 1953 graduated 19,651 Negroes from the elementary schools and 7,730 from the high schools. That the parochial (Catholic) schools of the Archdiocese of New Orleans between the years 1935 and 1953 graduated 6,087 Negroes from the elementary schools and 2,172 from the high schools.
>
> That Negroes, for fifty years or more, have served on juries in the U. S. District Court for the Eastern District of Louisiana, New Orleans Division.
>
> That in the year 1950 there were numerous Negro males operating businesses in the City of New Orleans including 15 insurance companies that employed about 2,000 persons.
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> That in the year 1950 there were approximately 1,500 Negro males employed by the U. S. Post Office Department; 700 Negro males employed as teachers; and approxi-

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[45] See footnote 31.

mately 1,027 in professional, technical and kindred employment.

That there have been institutions for the higher education of Negroes operating in New Orleans since 1870, at which time Straight University was founded, followed by New Orleans University in 1879; Xavier University in 1915; and Dillard University in 1935, formed by a merger of Straight University and New Orleans University.

That [in 1950] there were 51,126 [Negro] males between 20 and 64 years of age. That the median years of education completed by the Negro segment of the 1950 population in New Orleans was 6.5 years.

That in the year 1952, there were 28,005 Negroes registered to vote in the Parish of Orleans."

Certain other statistics have a special relevancy to the number of Negroes in the parish eligible to serve on juries. See Appendix A. In 1950 64 per cent of the non-white population had more than four years schooling. Table 4. Under Louisiana law (LSA-R.S. 15:174 (194), there were only 444 Negroes exempt because of their occupation. This compares with 9,132 whites or 6.99 per cent exempt from jury service. Table 5, Appendix A.

There is an analogy between the instant case and *Gomillion v. Lightfoot*, 1960, 364 U. S. 110, 81 S. Ct.

125, 5 L.Ed.2d 110. In that case an Alabama statute redistricted, gerrymandered, the City of Tuskegee. The obvious effect was a twenty-eight-sided city that fenced off most of the white citizens from former Negro citizens. The Court read into the statute purposeful discrimination. Here the exclusion of daily wage earners, barring 47 per cent of the Negro work force, coupled with the commissioners' failure to seek additional Negroes for the general venire made it impossible for Negroes to reach the jury box in criminal cases in Orleans Parish. Instead of the State's coming forward with an acceptable explanation for the exclusion of Negroes, the State has proved facts that give rise to an inference of "purposeful discrimination" on the part of the jury selection officials, within the legal sense of those words. "The Jury Commissioners and other officials responsible for the selection of this panel were under a constitutional duty to follow a procedure—'a course of conduct'—which would not operate to discriminate in the selection of jurors on racial grounds". *Hill v. Texas*, 1942, 316 U.S. 400, 62 S.Ct. 1159, 86 L.Ed. 1559. Like the discrimination in *Hill v. Texas*, the "discrimination [in Orleans Parish] arise[s] from the action of commissioners who exclude all Negroes whom they do not know to be qualified and who neither know nor seek to learn whether there are in fact any qualified to serve." 316 U.S. at 400. See Brooks v. Beto, 5 Cir. 1966, F.2d.

C. Louisiana, like most states, exempts from jury duty certain occupational groups such as public officials, doctors, firemen, policemen, and others. The legislature has decided that for the good of the community men engaged in these occupations should not have their work interrupted by jury service. But the legislature has not seen fit to exempt, *as a class*, "outside" workers, manual laborers, and earners paid a daily wage.[46]

The Louisiana district courts have extensive judicial discretion to excuse individuals but not classes from jury service.[47] *State v. Dorsey*, 1945, 207 La. 928, 22 So.2d 273. The scope of this authority is limited to deciding "the competency of jurors in particular cases" of "physical infirmity", "relationship", or "incompetency to sit upon the trial of any particular case".[48] Unlike 28 USC § 1863, financial hardship is not a ground for exemption; only hardship because of age or physical infirmity. And, as Article 174 expressly states, "the exemption shall be personal"

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[46] See footnote 37 for LSA-R.S. 15:174.

[47] "While there is ample precedent for conferrings on a court or judge power to 'excuse' individual jurors, there is no precedent known to the writer for conferring on a court or judge power to determine what classes of persons should be relieved of the burdens of jury service." Blume, Jury Selection Analyzed, 42 Mich. L. Rev. 831, 859 (1944).

[48] LSA-R.S. 15:172, establishing the qualifications for jury service provides, in pertinent part: ". . . that the district judge shall have discretion to decide upon the *competency of jurors in particular cases where from physical infirmity or from relationship, or other causes, the person may be, in the opinion of the judge, incompetent to sit upon the trial of any particular case.*" LSA-R.S. 15:192 reads: "The jury commissioners for the Parish shall qualify all persons before their selection as jurors, but the judges of the several district courts shall have the right to decide upon the competency of jurors."

and is not a ground for challenge. *State v. Smothers*, 1929, 168 La. 1099, 123 So. 781; *State v. Ross*, 1947, 212 La. 405, 31 So.2d 842.

It is significant that notwithstanding the long existence of the practice in Orleans Parish of excluding daily wage earners, the Projet of the Louisiana Code of Criminal Procedure, just enacted by the Louisiana legislature, contains no disqualification, exclusion, or exemption of prospective jurors who are daily wage earners. Nor is there an exemption of jurors for financial hardship. The Louisiana legislature apparently regards jury service as the Supreme Court regarded it in *Thiel*, a duty to be fulfilled regardless of loss of earnings:

> "Jury service is a duty as well as a privilege of citizenship. It is a duty that cannot be shirked on a plea of inconveniency or decreased earning power." *Thiel v. Southern Pacific Co. supra*, 328 U. S. at 224.

IV.

We hold that the petitioners made out a prima facie case. In 1953 and for five years before, in the Parish of Orleans the method of selecting juries failed to meet the constitutional standards adopted by this Court and the Supreme Court. The record shows systematic exclusion of Negroes from the Orleans Parish jury system.

We hold that the state has failed to come forward with an acceptable constitutional explanation for the longstanding disproportionately small number of Negroes on venires and the resulting total absence of Negroes on grand and petit juries. The systematic exclusion, as a class, of all manual laborers, outside workers, artisans, and earners making a daily wage deprived the petitioners of an impartial jury, a cross-section of the community, in violation of the due process and the equal protection clauses of the Fourteenth Amendment.

The vice in the method of selecting jurors infected the entire jury system in the parish. *Pierre v. State of Louisiana*, 1939, 306 U.S. 354, 59 S.Ct. 536, 83 L.Ed. 757 and *Davis v. Davis*, 5 Cir. 1966, F.2d . Since the petit jury and the grand jury venires were drawn from the same jury wheel "the lists from which the grand jurors were chosen were the product of the same unconstitutional course of conduct which resulted in discrimination in the selection of petit juries." *Davis v. Davis*, 1966, F.2d at .

The judgment of the trial court is REVERSED and the case is REMANDED with directions to issue the writ releasing the petitioners from custody on their present convictions and sentences, subject, of course, to reindictment and to retrial by the State. See *Scott v. Walker*, 5 Cir. 1966, 358 F.2d 561; *Davis v. Davis*, 5 Cir. 1966, F.2d .

APPENDIX A

Counsel for petitioners submitted the following tables, based on the record, to show that an adequate non-white jury population existed in Orleans Parish in 1953.

Table 1: Male population between twenty-one and sixty-five years of age of Orleans Parish by Race for 1940, 1950, 1960, and 1953.

Year	White	Non-White
1940	142,209	40,113
1950	116,269	46,287
1960	104,209	50,412
1953	111,193	48,231

Data derived from Population Census U.S. Dept. of Commerce Bureau of the Census, 1940 2:3 Table 22, 1950 2:18 Table 33, 1960 1:20 Table 20.[1]

Table 2: Estimated proportion of the Male Population of Orleans Parish by Race in 1950 belonging to various categories.

Subject	White	Non-White
Citizens[2]	98.5%	99.6%
Residents[3]	94.6%	97.9%

[1] 1953 figures estimated from census figures for 1940, 1950, 1960 by use of three-point Le Grange Interpolation Formula.

[2] Citizens derived from 20% sample 21 and over, according to sex, in Orleans Parish in 1950. 1950 Census 2:18 Table 55.

[3] Proportion of residents is estimated from place of residence in 1949 against 1950 for 20% sample of total population one year and over of Orleans Parish in 1950. 1950 Census Bulletin P-D36 Tables 1 & 4, and from 1950 Census 2:18 Table 33.

More than four years schooling[4]	89.6%	64.7%
No occupational Exemption[5]	93.0%	98.7%

Table 3: Total population of Orleans Parish over 21 by race for 1940, 1950, 1960, 1953.

Year	White	Non-White[6]
1940	331,411	94,985
1950	271,421	113,241
1960	257,495	125,752
1953	262,241	117,597

Table 4: Estimated proportion of the population of Orleans Parish by Race in 1950 belonging to various categories.[7]

Subject	White	Non-White
Citizens[8]	98.55%	99.65%
Residents[9]	94.6%	97.9%
More than four years schooling[10]	89.9%	67.0%
No occupational Exemption[11]	93.0%	98.7%

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[4] Schooling figures obtained from 20% sample according to sex of population of Orleans Parish in 1950, 25 years and over. 1950 Census 2:18 Table 65.

[5] See Table 5.

[6] Other Races 0:5%.

[7] Table of the Binomial Distribution, Harvard University Press, Cambridge, Mass. 1955.

[8] Note 2 supra.

[9] Note 3 supra.

[10] Note 4 supra.

[11] Note 5. supra.

According to LSA-RS 15:174 (Code of Criminal Procedure), certain persons are exempt from Grand and Petit Jury service. If attention is confined to Sec. 3, alterations to the previously stated figures concerning the population eligible to serve as Grand or Petit Jurors must be made as follows:

Table 5: Males over the age of 14, employed in certain categories exempt from Jury Duty under LSA-RS 15:174 Sec. 3, residing in the New Orleans Standard Metropolitan area in 1950. By Race.

Category	White	Negro
Total	131,225	42,966
Lawyers & Judges	966	3
Physicians & Surgeons	1,478	48
College Presidents, Professors & instructors	444	28
Dentists	333	16
Pharmacists	413	20
Firemen, Fire Protection		
Salesmen & Sales Clerks (manufacturing and wholesale excluding retain clerks)	4,036	49
Teachers	638	276
Total in exempt categories	9,182	444
% in exempt categories	6.99%	1.03%

Source: 1950 Census 2:18 Table 77

Table 6: Proportion of non-whites in various populations.

Population	Proportion (N/W+N))
Eligible for Jury Service	
Males only 1953	25.8%
Both sexes 1953	27.0%
Males only	24.4%
Commissioners' Proposed Venire	
Jan. 1948 thru 3/53	6.2%
sub-sample undetermineds	6.0%
Nov. 1952 thru 3/53	4.9%
Final Venire	
Jan. 1948 thru 3/53	3.7%
sub-sample race undetermined	1.7%
Nov. 1952 thru 3/53	3.1%

GEWIN, Circuit Judge, Dissenting:

This case, involving one of the most heinous crimes ever committed in the rich and varied history of New Orleans, Louisiana, has been lost in the "nice, sharp quillets of the law."[1] I respectfully dissent, and in doing so challenge the interpretation of the facts, the reasoning and the legal conclusions applied to the facts in the majority opinion. I do not disagree with the abstract legal principles discussed, but the record does not support the facts found in the opinion; and therefore, the application of such legal principles to the facts found results in error.

A careful analysis of the opinion will clearly demonstrate that there has been a serious misconception

[1] Shakespeare, King Henry, VI, Part I, Act II, Scene IV.

of the issues we are called upon to decide, a misinterpretation or failure to accord proper weight to certain salient facts and an inaccurate interpretation of the prior decisions in the case. Moreover, a close scrutiny of the history of the case presents in bold relief a typical array of current tactics too often employed by criminal defendants,[2] bordering upon if not actually constituting oppression and harassment of an important witness for the prosecution; an unmerciful attack on counsel and court alike; the assertion of issues which can best be disproved by witnesses who are now dead; a shifting of issues and the assertion of new issues after losing on the ones first asserted;[3]

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[2] No improper reflection is intended with respect to counsel who must present the issues which their clients assert and insist upon.

[3] In footnote 5 of its opinion in Michel v. State of Louisiana (Poret and Labat v. State of Louisiana) 350 U.S. 91, 100 L.ed. 83; *reh.den.* 350 U.S. 955, 100 L.ed. 831, the Supreme Court made this observation with reference to the attack on the grand jury:

> "Not only may the prompt determination of such preliminary matters avoid the necessity of a second trial, but a long delay in its determination, such as here, makes it extremely difficult in this class of case for the State to overcome the prima facie claim which may be established by a defendant. Material witnesses and grand jurors may die or leave the jurisdiction, and memories as to intent or specific practices relating to the selection of a particular grand jury may lose their sharpness. Furthermore, a successful attack on a grand jury that sat several years earlier may affect other convictions based on indictments returned by the same grand jury."

In Labat v. Sigler, 162 F. Supp. 574 (E.D. La. 1958) Judge J. Skelly Wright concluded:

> "Petitioners, throughout this long litigation, have been represented by competent counsel of their own choosing. Their case has been considered by the Supreme Court of Louisiana and the Supreme Court of the United States on two separate occasions. Their case has been before the lower courts of the state and nation innumerable times. This court has, in effect, retried the petitioners for the offense of which

a strong and venomous condemnation of state and sometimes local federal courts; the claim of newly discovered evidence; and the allegation that conviction was based on coerced and fraudulently obtained evidence.

Nothing herein said is meant to relate to the question whether the law providing for capital punishment in aggravated rape cases is good or evil for the residents of the State. That decision must be made by the legislative branch of the state government of the State of Louisiana. Furthermore, we must consider the case with the realization that we have no power to pardon, or to exercise executive elemency.

I. The Issue

The only issue[3a] before us is succinctly and clearly stated in the per curiam opinion of the Supreme

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they have been convicted. While it must be owned that the conviction of a Negro of rape of a white female in this state should be subjected to the severest scrutiny, on the basis of the record made here, this Court cannot say that these petitioners were denied due process of law."

[3a] While there are substantial areas of agreement in this dissent and in the opinion of Judge Bell concurring in the result, there are two material differences: (1) in my view Judge Bell's opinion, in dealing with the question of the exclusion of wage earners as a class, goes beyond the terms of the mandate of the Supreme Court which directed consideration of the race issue only. Michel v. State of Louisiana, supra; and (2) even if the economic issue of excluding wage earners is a proper subject for consideration, the record does not support a conclusion that there was a deliberate and intentional exclusion of such wage earners as a class. Certainly, the record does not support the conclusion that "all daily wage earners" were excluded. Rather, at best the record shows a liberal granting of excuses upon request for purely benevolent reasons in a system which did not provide for pay for jury service in the state court.

Court, *United States ex rel Clifton Alton Poret and Edgar Labat v. Sigler*, 361 U.S. 375, 4 L.ed.2d 380, in the following language:

> "The judgment is vacated and the case remanded to the District Court for disposition of the question *whether members of petitioner's race were deliberately and intentionally limited and excluded in the selection of the petit jury panels, in violation of the Federal Constitution.*" (Emphasis added)

There should be no argument about the fact that the question we are to determine is whether there has been a Federal Constitutional infringement with respect to *deliberate* and *intentional* limitation and exclusion of the petitioner's *race* in the selection of *petit* jury panels. The majority opinion does not deal with the issue of *deliberate* and *intentional* exclusion on account of *race* in the selection of *petit* jury panels. It is concerned with grand juries, economic considerations in jury selection in civil cases, and omits consideration of evidence relating to the issue of deliberate and intentional exclusion.

The District Court for the Eastern District of Louisiana, *United States ex rel Poret and Labat v. Sigler*, 234 F. Supp. 171 (1964), proceeded exactly in accordance with the mandate of the Suprme Court. It did not rely "on the ubiquitous fiction of waiver" quite as heavily as the majority indicates.[4] What the major-

[4] The majority opinion, in summarizing the holding of the District Court, emphasized that the District Court held "they are now deemed to have *waived* these objections." (Emphasis added

ity quotes from the opinion of the District Court would be characterized better as the District Court's summary of the holding of the Supreme Court in its first review of the case on certiorari to the Supreme Court of Louisiana. *Michel v. State of Louisiana (Poret and Labat v. State of Louisiana)* 350 U.S. 91, 100 L.ed. 83; *reh den.* 350 U.S. 955, 100 L.ed. 831. I quote from the opinion of the District Court:

> "They failed to make such objections timely, and hence, as *previously decided by the United States Supreme Court* in this very case, they are now deemed to have waived those objections." (Emphasis added)

Regardless of the consideration given to the waiver question by the District Court, it actually proceeded to a full hearing on the issue of the composition of petit jury panels. Again we quote from the District Court's opinion:

> "Even though this Court is convinced that petitioners' objections to the make-up of the jury come too late, *nevertheless, out of an*

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by majority). The Court's opinion further concludes, in effect, that "the District Court's reliance on the ubiquitous fiction of waiver" was misplaced. Further stressing consideration of the waiver question, the majority asserts:

> "The district court, however, relying on Michel (Labat-Poret), held that the petitioners, having failed to make timely objections to the jury, 'are now deemed to have waived those objections'. 234 F. Supp. at 175.
>
> "The district court's error on this point and the states' frequent reliance on the doctrine of waiver in federal habeas cases demonstrate the need in this circuit for a close look at the Supreme Court's discussion of that doctrine in Fay v. Noia, 1963, 372 U.S. 391, 76 S.Ct. 158, 9 L.ed.2d 387."

> *abundance of caution, detailed testimony was* taken concerning the composition of the petit jury involved and concerning the general practice in the past in the Parish of Orleans, State of Louisiana, in selecting and drawing juries. *A review of this testimony* convinces this Court that there is simply no merit to petitioners' contentions." (Emphasis added)

II. The Facts.

A. Deliberate and Intentional Exclusion from Petit Jury.

The Court extensively quotes Judge O'Hara who testified in the case. The most lengthy quotation, however, is from an opinion by him rendered in October, 1952. The opinion is unreported, but from the lengthy quotation it is clear that Judge O'Hara was dealing with *grand juries.* At least Judge O'Hara's opinion was designed to *correct* any abuse which existed in the peculiar manner of selecting grand juries in Orleans Parish prevalent at the time of his decision. It seems fair to say that the only question involved was not systematic exclusion "from Parish juries" but systematic exclusion from the grand jury. The action condemned by Judge O'Hara was the practice of the Orleans Parish judges in selecting *grand* juries under the old system. There is no mention of the jury selection officials who compile the general venire or jury wheel. Indeed, his opinion indicates the presence of Negroes in the jury wheel

or on the general venire. His testimony showed that for 16 years prior to trial in this case the names of colored persons had been placed in the jury wheel and that colored persons constantly appeared on the general venire.

Here again we emphasize that the issue here involved does not relate to the grand jury but to "the selection of *petit* jury panels."

Accordingly, it seems more appropriate to quote the testimony by Judge O'Hara who appeared before the District Court as a witness on behalf of the petitioners with the expressed assertion by counsel for the petitioners that the evidence taken at the trial was for the benefit of both Poret and Labat. Judge O'Hara testified with rsepect to the method of selecting petit jurors in Orleans Parish for the actual trial of cases at the time of the trial of Labat and Poret and the period immediately preceding the trial. This fact makes his testimony unusually important. It is factual and not a theoretical, statistical estimate based on incomplete figures. We quote both from the testimony of Judge O'Hara given in open court and from his deposition. The following is a fair sampling from his testimony:

"Q. On hardship reasons, did you show any discrimination in releasing or failing to release anyone, white or black?

"A. No.

"Q. On account of their color?

"A. No. There was no discrimination whatsoever.

"Q. Now, the same way as far as the exemptions, whether a man was white or colored, if he said he was a schoolteacher or a municipal employee, or over the age of sixty-five, would it make any difference whether he was white or black?

"A. No."

* * *

"Q. Judge, what I am trying to do, and I am not trying to do anything except what is strictly one thousand percent correct, without taking advantage of anybody, in the stipulation it is shown, which is already a part of the record in this case, that a certain percentage as to how many people actually serve on the juries who are white or who are black. Now, I was going to ask and Mr. Gill anticipated this, in the question, when men were excused or challenged for cause or preemptorily challenged, no discrimination was made by the judges, including yourself?

"A. Oh no, oh ho, oh no, oh no. If the juror, the prospective juror was challenged for cause and happened to be white or happened to be a negro, it wouldn't make any difference. It would be a question of what the cause was whether he would be excused for cause or not."

In speaking of a jury venire of approximately 150 persons, Judge O'Hara testified as follows:

"Q. Do you recall during the period that I mentioned, [1948-1953] whether or not it

was general to find Negroes serving on the panels of veniremen for the petit jury in Orleans Parish?

"A. I would say yes. I would like to be a little bit better on the dates. Yes, the answer is yes. We had colored persons on the jury venire, I guess from the latter part of 1930.

"Q. From then on?

"A. Then on.

"Q. Were they there in any substantial numbers?

"A. Well, I would consider that there were a representative number of Negroes on the panels.

"Q. By a representative number, what do you mean?

"A. Well, I would state that in the City of New Orleans there are a whole lot more whites than [sic] are able and qualified to serve on juries than Negroes, and the number of Negroes represented the best effort of the Jury Commissioners to get Negroes on the panels.

"Q. Were there as many as one-third of the veniremen Negroes in any of the venires you handled during that period?

"A. No.

"Q. Would you say there were as many as 20% Negro?

"A. 20% would be about thirty.

"Q. One-fifth?

"A. No.

"Q. Would you say there were ever as many as 10%?

"A. Oh, yes.

"Q. At times?

"A. I would say there were never less than that; I would say that it would run about about between 20 and 25.

"Q. —Negroes on the panel or the venire?

"A. Yes. It would run about 20, 22, 23, 18, 16. Some months there would be more than others.

"Q. Are these absolute figures, or percentage figures?

"A. From my own estimation, the colored people would run from about, I guess about 15 to 25, or maybe a little less than 25 —22, 18.

"Q. You are talking about in absolute number, now, Judge?

"A. Yes.

"Q. The Judges had nothing whatever to do with the selection of petit jury veniremen; is that correct?

"A. That's right. That was just by the Jury Commissioners. Now, I would interest myself from time to time to see what the Jury Commissioners were doing and it was always my observation that they were trying to get as many colored in the jury wheel as they could.

"Q. Did you ever make a statistical analysis of the number of Negroes that were included in the jury wheel?

"A. No, but I do know that the Jury Commissioners would ask Negroes to give them the names of other Negroes, and they would ask the members of the Negro corporations, insurance companies and whatever sources they thought they could get Negro jurors from. They would make inquiry. I am not talking about the administration; I am just saying from time to time I would interest myself because I wanted to see what they were doing."

* * *

"Q. Would you feel that a large percentage, or at least a significant percentage of wage earners that came to you with this excuse would probably receive, or, in other words, their excuse would be granted?

"A. Yes.

"Q. Did you find too that a large proportion of those persons who came to you with this request for excuse on the grounds of being wage earners or day workers were Negroes?

"A. Well, there were quite a few Negroes would ask to be excused for that reason. There was no discrimination made, I would like to say that. Whatever applied to the white would apply to the colored, and whatever applied to the colored would apply to the white.

"Q. But at the same time, you did find there was a significant percentage of the excuse for being wage earners which were made by Negroes?

"A. Yes.

"Q. —Veniremen?

"A. Yes. That was one of the great difficulties of getting colored people. For instance, a man would come up and say, 'I am a porter, I work for a small salary someplace and have got a 'family,' and not getting paid if he doesn't work.

"Q. If a man had come up and said that, given you that excuse, one man white and another man gave you the same excuse and he was colored, they would be treated alike?

"A. Yes."

* * *

"A. I could say this, that I know of no plan or desire on anybody's part to minimize the number of Negroes in the wheel."

B. The Stipulation.

In Section II D of its opinion the majority asserts "turning to the facts showing the opertive effects of the Orleans Parish jury system, we find that many of the facts have been stipulated." The opinion does not then fully quote the stipulation, but immediately turns to certain statistical reports set forth in Appendix A to the opinion. Thereafter, in dealing with the subject there is a resort to mathematical calcu-

lations, percentages and other statistical data. Later in Section III of the opinion, to support its conclusion and finding of a "failure of the Jury Commissioners to take any action to compensate for the exclusion of Negro wage earners by seeking out additional names of potential jurors raising an inference of purposeful discrimination," there is a lengthy quotation from the stipulation. The stipulation was jointly signed by counsel for all parties and it states "that the following facts may be taken as having been proved and true or are the subject of judicial notice of the Court."[5] The stipulation was offered on behalf of Poret and Labat and it would seem to me they should be bound thereby. The majority opinion takes note of the stipulation and quotes certain portions of it at length in Section III. The sequence of the numbered items lifted from the stipulation and quoted in the body of the opinion is as follows: Items 10, 11, 12 (13 omitted), 14, 15. There is a fail-

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[5] The following from the record:

"MR. SCHREIBER: On behalf of both relators, Clifton Alton Poret and Edgar Labat, we offer in evidence the stipulation, I guess we can identify it as Stipulation Number 1.

"THE COURT: Yes, all right, that is good, just Stipulation Number 1, because it is a joint offering.

"MR. SCHREIBER: Which is agreed to by the attorneys for all of the parties that are involved in this case, including the State of Louisiana.

"THE COURT: All right.

"MR. SCHREIBER: Also, Your Honor, I would like the record to show that any evidence that is taken in the trial of this cause also goes to the benefit of Clifton Alton Poret as well as Edgar Labat.

"THE COURT: I understand all of this evidence is to be offered by counsel, regardless of which of petitioners' counsel offers it, that it is to be offered in connection with both petitioners' claims, Clifton Alton Poret and Edgar Labat.

"MR. SCHREIBER: Yes, sir."

ure to take proper note of the contents of Item 13. It is only set forth in a footnote. It appears to me that Item 13 is as important as any of the other items contained in the stipulation. It reads as follows:

> "13) That although prior to February, 1953, no Negro had ever served on a petit jury empaneled to try a negro in the Criminal District Court for the Parish of Orleans, since 1936, the Jury Commissioners for the Parish of Orleans had *certified negroes* as qualifying under the state law in petit jury venires *in numbers approximating 10% of the venire.*" (Emphasis added)

Item 13 of the stipulation and Judge O'Hara's testimony are not in conflict. The Judge indicated that at least 10% of the general venire were Negroes; the stipulation states approximately that number were Negroes. Under the practice, petit juries which actually served as trial juries were taken from the general venire, at least 10% of which was composed of Negroes.

The mathematical calculations set forth in Section II D of the majority opinion are confounded, confused and completely nullified by the percentage figure stated in Item 13 of the stipulation and by the testimony of Judge O'Hara which we have quoted above.

In spite of what the majority says about the reliance of the District Court on waiver, the District Court did go into the merits of the question whether

there had been deliberate or intentional exclusion in the selection of petit jury. A hurried glance at the District Courts' opinion, 234 F. Supp. 171 at 178, makes this assertion obvious beyond any doubt. The District Court gives a full discussion of the facts and the reasons for its conclusion. It is simply not a fair appraisal of the opinion to state that it is based on waiver.

C. Deceased Judge and Deceased Lawyer.

A great controversy has arisen in this case as to when Labat and Poret attacked the jury system and the number of Negro jurors appearing on the panels at the time. The majority opinion itself is rather confusing as to just when the attack took place as I will show later in this opinion. One thing is clear, however, the two most important witnesses who could testify about the subject were dead when Labat and Poret made their frontal attack during the last habeas corpus hearing before Judge West in the District Court. Death has locked the lips of these key witnesses and concealed the facts about which they could testify. There is no intimation as to what the testimony of Judge Fred Oser would have been if he had lived.

The deceased attorney, Mr. Mahoney, is given the questionable accolade of having caused a default characterized as "the inadvertence or mistake of an ill and aged court-appointed attorney." Moreover, he is indirectly accused of having committed a "venial sin" because of hindsight judgment as to the

tactics he should have employed. I do not accept these accusations or conclusions. Mr. Mahoney, was not known to the writer, but certainly his long record as an honored criminal lawyer who served in his profession for 50 years justifies some answer to the accusation out of sheer respect for his memory as a lawyer, if nothing else. The determination of the Supreme Court in *Michel v. Louisiana (Poret and Labat v. Louisiana)* 350 U.S. 91 at p. 101 seems to be appropriate and sufficient. After accepting the holding of the trial court and the Supreme Court of Louisiana that there was no showing of a lack of effective counsel, the Supreme Court concluded that there was little support for the accusation against Mr. Mahoney. The court noted that Mr. Mahoney was a well-known criminal lawyer with nearly 50 years experience, and it concluded that there was *no evidnce* of incompetence. Speaking on this question and also the question of a failure to make an immediate attack on the grand jury, the Supreme Court asserted in footnote 7:

> "On the contrary, Mr. Mahoney, since deceased, was recognized as an exceptionally qualified counsel. On June 1, 1955, the legal profession in New Orleans honored him with a plaque which cited him as 'an astute and honored criminal lawyer who has ever been mindful of the oath administered him 52 years ago to uphold the law and to guarantee to each accused his day in court.' As pointed out in the State's brief, whether or not to make *an immediate attack*

on the grand jury was entirely within the discretion of Mr. Mahoney and *there were valid reasons for not doing so at the time.*" (Emphasis added)

D. Time of Attack on the Jury System.

In the beginning the opinion states that the petitioners' "consistently and unsuccessfully" asserted that they were denied a fair trial resulting from the systematic exclusion of Negroes. Later, however, the majority opinion concludes that after reading old briefs and records the attack was not actually made until the habeas action was filed in 1957 and that the failure of counsel to do so was a "venial sin".

Once again it is necessary to emphasize that we are not dealing with a *grand* jury question here. The mandate calls for consideration of exclusion "in the selection of *petit* jury panels." Evidently, the Supreme Court concluded that the grand jury question had been settled[6] because the mandate of the per curiam remand mentions "petit jury panels" only. Actually, that issue was settled when the case was first reviewed on writs of certiorari to the Louisiana Supreme Court, *Michel v. Louisiana, supra.* Judge West, as well as Judge Wright, took note of this fact as is obvious from Judge West's opinion in

[6] Judge J. Skelly Wright in his opinion, Labat v. Sigler, 162 F. Supp. 574 (1958), stated:

"The Supreme Court of the United States also affirmed the conviction after granting a writ of certiorari limited to an attack on the grand jury venire. Michel v. Louisiana, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83."

234 F. Supp. at p. 174 where he quotes from the opinion of the Supreme Court.

It is apparent that the Supreme Court considered the Louisiana Statute, Art. 202 so strongly criticized by the majority, as a valid state statute of limitations. A statute of limitations cuts both ways. As stated by the Supreme Court in *Pendergast v. United States*, 317 U.S. 412, 87 L.Ed. 368:

> "Every statute of limitations, of course, may permit a route to escape."

On the other hand, important policy considerations are involved,[7] as the Court pointed out in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 89 L.Ed. 1628 (1945):

> "Statutes of limitations find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litiga-

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[7] The following is from the opinion in Michel v. Louisiana (Labat and Poret), supra:

"Poret's case affords a perfect illustration of the necessity for prompt determination of claims such as he raises here. Five years have now elapsed since the crime was committed, and the delay has been largely caused by Poret's own actions. Even if available, and memory permitted, the victim and chief witness would be reluctant to retell the sordid story of her unfortunate experience. Poret's conviction *by a petit jury whose composition he did not attack has been affirmed* by Louisiana's highest court and no constitutional challenge is made here to the fairness of that trial." (Emphasis added)

tion of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. (Citing authority) They are by definition arbitrary, and their opration does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. They represent a public policy about the privilege to litigate."

E. Attack on Witness, Coerced Testimony, New Testimony.

The majority opinion points out that the application for habeas corpus in the United States District Court for the Eastern District of Louisiana filed September 18, 1957, was based on newly found evidence that a witness' testimony was perjured and coerced. Footnote 11 of the opinion also states that in addition the petitioners claimed that they had discovered a witness, one Elnora Henderson, who had not testified at the original trial, but who was now available. Her testimony would show that on the night of November 11, 1950 (the rape was alleged to have been committed early in the morning of November 12, 1950) she spent the entire night with Labat, that he was so drunk during the early morning hours of November 12 that she was unable to arouse him even though she massaged his body with ice cubes. It is difficult to see how such evidence or

such a witness would be newly discovered; because if the alleged testimony were true, certainly Labat would have known about Elnora Henderson and where he actually was when he did awaken. He was a part of the newly discovered evidence and an actor on the scene.

In the first habeas corpus proceeding in federal court, *Labat v. Sigler*, 162 F. Supp. 574 (1958), it is interesting to note the position taken by the petitioners. As observed by Judge J. Skelly Wright, the conviction had already been affirmed by the Supreme Court of Louisiana, *State v. Labat*, 226 La. 201, 74 So.2d 333, and by the Supreme Court, *Michel v. Louisiana*, 350 U.S. 91, 100 L.ed. 83. In that application the petitioners claimed they were convicted on perjured testimony of Earl Howard, a disinterested state witness, which perjury was coerced by the police. That issue was neither raised nor passed on during the original state court trial. Judge Wright commented as follows with reference to the pressures that had been placed on the witness Howard:

> "Unquestionably, as the evidence shows, he has been subjected to great pressures from persons seeking to help these petitioners since his testimony in the state court."

The Court concluded that there was no evidence whatever, aside from statements prepared by others for Howard's signature, that he had either committed perjury or was coerced into doing so by the police.

Nor was Howard the only witness involved. Judge Wright further stated:

> "While Howard definitely was an important witness in the state's case against the petitioners, the testimony of Penedo and Miss Rajek was at least as important. Both specifically identified the petitioners, not only in the state court trial but in this court, as the two persons who had raped Miss Rajek. *Their credibility is unchallenged* except in so far as the possibility of human error is always present in the identification of persons in the circumstances in suit." (Emphasis added)

In the circumstances, Judge Wright, subjected the evidence "to the severest scrutiny," but he denied the writ.

III. The Law

Returning again to the issue before us, namely, "whether members of the petitioners' race were deliberately and intentionally limited and excluded in the selection of petit jury panels," we turn to the most recent case decided by the Supreme Court, *Swain v. Alabama*, 380 U.S. 202, 13 L.ed.2d 759. Within the first page and a half of that opinion the Court sets forth the law bearing on the issue we must decide:

> "Although a Negro defendant is not entitled to a jury containing members of his race, a

State's *purposeful or deliberate* denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." (Emphasis added)

* * *

"*Nor is the constitutional command forbidding intentional exclusion limited to Negroes.* It applies to any identifiable group in the community which may be the subject of prejudices." (Emphasis added)

* * *

"But purposeful discrimination may not be assumed or merely asserted. Brownfield v. South Carolina, 189 US 426, 47 L ed 882, 23 S Ct 510; Tarrance v. Florida, 188 US 519, 47 L ed 572, 23 S Ct 402; Smith v. Mississippi, 162 US 592, 40 L ed 1082, 16 S Ct 900; Bush v. Kentucky, 107 US 110, 27 L ed 354, 1 S Ct 625. It must be proven, Tarrance v. Florida, supra; Martin v. Texas, 200 US 316, 50 L ed 497, 26 S Ct 338, the quantum of proof necessary being a matter of federal law."

The defendant in *Swain* was charged and convicted of the capital offense of rape. The jury venire in a capital criminal case usually contained about 100 jurors. After excuses and removals for cause the venire is reduced to about 75. It should be noted that in *Swain* there were six to eight Negroes on the venire, which would be around 10%. In the instant case

the stipulation (Item No. 13) states there were approximately 10% on a venire of 150 jurors. Judge O'Hara's testimony indicates a slightly larger percent. The Court concluded in *Swain* as follows:

> "Moreover, we do not consider an average of six to eight Negroes on these panels as constituting forbidden token inclusion within the meaning of the cases in this Court. Thomas v. Texas, 212 US 278, 53 L ed 412, 29 S Ct 393; Akins v. Texas, 325 US 398, 89 L ed 1692, 65 S Ct 1276; Avery v. Georgia, 345 US 559, 97 L ed 1244, 73 S Ct 891. Nor do we consider the evidence in this case to make out a prima facie case of invidious discrimination under the Fourteenth Amendment."

The *Swain* case dealt with the issue of a *purposeful* and a *substantially effective* effort to deprive members of the Negro race any realistic opportunity to serve as jurors. See also *Akins v. Texas*, 325 U.S. 358, 405-6; *Thomas v. Texas*, 212 U.S. 278-88; *Fay v. Noia*, 332 U.S. 261 at 284; *Brown v. Allen*, 344 U.S. 443, 471. In *Brown v. Allen*, Negroes comprised only 7% of the names on the jury list in a county where they comprise 38% of the eligible taxpayers. The Court held the discrimination was caused by an economic factor rather than a racial one and hence it found no constitutional violation. In this case the colored population was approximately 31-32% and as stated, the evidence clearly shows that Negroes

composed approximately 10% of the petit jury panels.

It has long been the rule that a person asserting an intention to exclude and thus attacking the jury selection procedure has the burden of proving such intent. *Smith v. Mississippi*, 162 U.S. 592, 600; *Tarrance v. Florida*, 188 U.S. 519; *Martin v. Texas*, 200 U.S. 316; *Fay v. Noia, supra*, 382 U.S. at 385.

The majority goes to great length in discussing economic factors involved. Heavy reliance is placed on the civil case of *Thiel v. Southern Pacific Co.*, 328 U.S. 217. More appropriate authority is *Brown v. Allen, supra*, where an economic factor was involved in a criminal case in which racial discrimination was claimed. If the ratio of 7% Negroes on the jury list as compared with 38% of the eligible taxpayers from which the jury list was composed did not constitute constitutional wrongdoing where an economic factor was involved, it is difficult for me to conclude that there has been constitutional infringement in the instant case where the more favorable figures of 10% on the petit jury panels must be compared with 31-32% of the population. Moreover, the *Thiel* case did not deal with the question of constitutional infringement, and the racial question was not involved; the Court was exercising its supervisory power rather than passing on a fundamental constitutional issue.

IV. Conclusion

Pretermiting any further discussion of the question when the attack on the jury system was made, the matter of waiver, and all the other elements in the case, it is clear to me that the petitioners have not proven deliberate and intentional exclusion of Negroes in the selection of petit jury panels. Their evidence was vague, indefinite and uncertain. It was chiefly theoretical, statistical proof. The District Court was amply supported by the evidence in concluding that the race or color of 44% of the total number of names appearing on the venires was not determined. It is obvious why the actual attack on the petit jury panels came only after all other efforts failed, and finally that attack also failed. The facts show that for years there had been substantial numbers of Negroes on the petit jury venire, and there was no substantial evidence of intentional and purposeful exclusion. At best, the initial attack did not rise above a loose allegation which was not supported by any evidence. The judgment of the District Court should be affirmed.

Justice tempered with mercy plus a fair trial, even for those charged with the most revolting crimes, are principles deeply embedded in the American system. Courts and law enforcement agencies should never deviate from those concepts.

It seems appropriate to observe, nevertheless, that this nation has spent much time and exercised great efforts throughout its history to persuade victims of

heinous crimes to let the courts determine guilt and fix punishment. Great success has been achieved. Mob violence, "lynch law", and the pistol and gun of the avenger have ended in large measure. There is a growing alarm, however, over the rapid increase of crime and the reluctance of citizens, victims and witnesses alike, to turn to the courts for help. See *Miranda v. Arizona*, ... U.S. . . . . (1966), (dissenting opinion) where Mr. Justice White stated:

> "The most basic function of any government is to provide for the security of the individual and of his property. Lanzetta v. New Jersey, 306 U.S. 451, 455. These ends of society are served by the criminal laws which for the most part are aimed at the prevention of crime. Without the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values."
>
> * * *
>
> "Secondly, the swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted."

How long will citizens exercise appropriate restraint while the courts continue to indulge in delay and return to society the ruthless rapist, the stealthy nighttime burglar, the cold blooded murderer, the sex fiend or members of organized narcotics gangs?

The case of the criminal often becomes a cause celebre resulting in unreasonable public expense, and in some respects, he becomes the hero and player of the leading role in a fantastic display of court procedures that continue for years upon years. The victims are forgotten. Some are dead! A proper balance between the protection of society and the rights of the individual charge with crime must be achieved.

It is now commonplace to hear unrestrained criticism of police and law enforcement officials. Lawyers who are appointed to represent defendants are charged with professional neglect and misconduct. If the defendant is convicted, the lawyer is accused of furnishing ineffective representation. The accusation is spread upon the records of the court. The lawyer then becomes embroiled in the defense of his own actions in doing his best to represent the accused defendant, even under court appointment. Sometimes his reputation for honesty is placed in jeopardy. In some cases his professional reputation is scarred and blotted.

In my view, remembering always the rights of hte accused, the times demand a close examination of the entire system by which criminals are tried, and from it there should be cut away some of the evident soft sentimentality which at times seems to be prevalent, and in its place a fair degree of firmness and austerity should be substituted in dealing with defiant, dangerous and diabolical criminals.

BELL, Circuit Judge, concurring in the result:

I concur in the result for the reason that the exclusion, as a class, of all daily wage earners deprived appellants of an impartial jury in violation of the due process and equal protection clauses of the Fourteenth Amendment. My concurrence, unlike the majority opinion, is not based on race. This special opinion is filed to outline my disagreement with the race premise of the majority opinion, and also for cautionary purposes with respect to some of the language of that opinion.

It is necessary first to separate the wheat of the majority opinion from the chaff. Three points may be taken as settled. One, this is not a grant jury case although a large portion of the majority opinion is focused in that direction. The Supreme Court ruled against appellants on the grand jury question years ago. *Michel v. State of Louisiana*, 1955, 350 U.S. 91, 76 S.Ct. 158, 100 L.Ed. 83. Two, the District Court did not rest its decision merely on waiver. It decided the case alternatively on waiver and on the merits. Third, the petit jury question was not asserted in the Supreme Court on the first appeal. The court was at pains to point out that no attack was made on the composition of the petit jury. Instead, that question was apparently saved under the piecemeal appeal practice now prevalent to be raised if need on another day. On the question of piecemeal appeals see *Paige v. Potts*, 5 Cir., 1965, 354 F.2d 215, Footnote 2; and *cf. Marion v. Harrist*, 5 Cir., 1966, ... F.2d . . . . [No. 22, 649, decided July 18, 1966], where at least

one constitutional question was held out for future use.

The only question for decision, assuming no waiver, and waiver is never a popular doctrine in a death case, is whether Negroes were deliberately and intentionally limited and excluded in the selection of petit jury panels in violation of the Constitution. This question was mandated to the District Court by the Supreme Court in 1960, over ten years after the commission of the crime in question.

The majority holds that appellants made out a prima facie case by showing a system which had not produced Negro jurors who actually served on a grand or petit jury for several years up to the time of trial and which in any event produced only a token number of prospective Negro jurors. The evidence also disclosed a system whereunder daily wage earners and all outside workers were excluded from the overall jury list from which petit jural panels are drawn. The latter disclosure, in my judgment, made out a prima facie case, which was not overcome. However, I do not agree that the evidence made out such a case with respect to exclusion or limitation based on race.

The majority places great stock in the fact that no Negro actually served on a grand or petit jury during the period in question. Such reasoning conflicts with *Swain v. Alabama*, 1965, 380 U.S. 203, 85 S.Ct. 824, 13 L.Ed.2d 759 and our recent *en banc* decision

in *Scott v. Walker*, 5 Cir., 1966, 358 F.2d 561 where we said:

> ". . . nor does the Constitution require that any particular panel of jurors in a criminal trial include members of the race of the accused person. Swain v. Alabama, 380 U.S. 202. . . ."

Of course, it may be that the fact of no actual jury service by a Negro is submitted as a factor in the total proof picture relating to exclusion or limitation based on race and not as a conclusionary fact. Nevertheless, it is a slender reed on which to base a finding of deliberate and intentional limitation and exclusion of Negroes in the selection of petit jury panels in light of the undisputed evidence that each of the 150 person jury panels included at least ten percent Negro representation. This was a stipulated fact and the testimony of Judge O'Hara indicates an even higher percentage over a sustained period of time. In line with other testimony in the case that a smaller percentage of Negro population was qualified for jury service than the white population, this minimum of ten percent representation as compared to a thirty two per cent Negro population does not make out deliberate and intentional limitation or exclusion of Negroes from jury service.

It does appear that the 150 person panels were usually reduced by the trial judges to a final venire of approximately 75 persons and that the percentage of Negroes on these final venires was only slightly

over three per cent. However, the reduction in Negro representation came about through excusing jurors who asked to be excused because of a hardship, or simply by letting those of the 150 serve who volunteered to serve. Apparently only about one half of the 150 jurors on each panel were needed for actual service so many could be excused. This practice is hardly a basis for a finding of deliberate and intentional limitation or exclusion of Negroes from jury service.

On the other hand, I do think the practice of excluding all daily wage earners from jury service violates the requirement that a jury list be comprised of a fair cross-section of a community. *Theil v. Southern Pacific*, 1946, 328 U.S. 217, 66 S.Ct. 984, 90 L. Ed. 1183, makes such a requirement clear in federal cases. *Fay v. New York*, 1946, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043, points out that the reversal in *Theil* rested on the supervisory power of the court of federal trials. Then, the court, in *Brown v. Allen*, 1952, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469, while adhering to its *Fay* position that rules dealing with the selection of federal juries are not applicable in state court proceedings, nevertheless said:

> "Our duty to protect the federal constitutional rights of all does not mean we must or should impose on states our conception of the proper source of jury lists, so long as the source reasonably reflects a cross-section of the population suitable in character and intelligence for that civic duty. . . ."

Implicit in the rationale of *Fay v. New York* and *Brown v. Allen*, is the teaching that the equal protection and the due process clauses of the Fourteenth Amendment are violated by the exclusion of a class where the result is a jury list that does not reflect a fair cross-section of the community.

This fault in the Orleans Parish jury system is not based on race except insofar as there happened to be more Negro daily wage earners than white but it is a fault of such a magnitude as to indicate an improper jury system. This is not to say that there was not a reason for the exclusion. Jurors in Orleans Parish are not paid and the exclusion of this class of jurors was for the practical reason that jury service would amount to a financial hardship and the tendency in the end would be to excuse jurors in this class anyway. Nevertheless, such a blanket exclusion cannot be permitted whatever the reason and the case is due to be reversed because of this fault.

The mandated question was to determine whether there was a deliberate and intentional limitation and exclusion of Negroes contravening the federal Constitution. My own conclusion goes outside that question but I doubt that we are limited to a narrow reading of the question and the scope of the question would include a finding of a defective system based on the exclusion of the wage earner class.

A word of caution is appropriate with respect to some of the other language in the majority opinion.

As concerns the waiver question, I would emphasize the deliberate by-pass doctrine of *Fay v. Noia*, 1963, 372 U.S. 391, 76 S.Ct. 158, 9 L.Ed.2d 387. Defense counsel should not take the court's derogation of the waiver doctrine where applied to federal constitutional rights in federal habeas courts as a license to forego challenging jury systems and thereby provide a built-in error in the event the first trial results in a conviction. Moreover, trial courts should be alert to avoid just such situations by requiring counsel to make a choice in the first instance as to whether the jury system is to be challenged.

The opinion of the majority tests the disparity between non-white population and the number of Negroes on the jury list without regard to literacy. As my dissent in *Rabinowitz v. United States*, 5 Cir., 1966, ... F.2d ...., makes clear, and as I have stated here, I think the disparity should be tested in light of a reasonable literacy standard. The comparison should be made on the basis of the percentage of the Negro population available and qualified for jury service as against the percentage of Negroes on the jury list. In this connection, there is some mention in the majority opinion of a literacy standard based on a fourth grade education. This contemplates jury service by functionally illiterate persons. I do not think this is an adequate educational standard in a country dedicated to education and where all states save one have compulsory education. The harm done to the jury system by the adoption of such a low standard would be incalculable. Assuming that

the right to jury trial under the Sixth and Seventh Amendments is a viable right, it could hardly be supposed that the right would not include a jury made up of jurors who could comprehend the issues, and who would have the capacity to resolve the issues. Such issues must often be resolved by sifting complex facts and by following difficult instructions on the appertaining law. How is this right to be vindicated where a jury list includes illiterates? Voire dire questions might disclose illiteracy but at the risk of offending or destroying the dignity of the jurors. Seemingly no other protection would be available. See *United States v. Henderson*, 7 Cir., 1962, 298 F.2d 522, for an approved jury system where an eighth grade education standard was one factor considered by jury commissioners in selecting prospective jurors.

The majority relies on state authorities for the proposition that an entire jury system is infected where the list does not represent a fair cross-section of the community and thus finds that appellants have standing. This proposition, if not settled by the broad language of the Supreme Court in *Ballard v. United States*, 1946, 329 U.S. 187, 67 S.Ct. 261, 91 L.Ed.2d 181, a federal jury case resting on the supervisory power, was at least forecast. The court there said that reversible error in such event does not depend on a showing of prejudice in an individual case. The due process clause of the Fourteenth Amendment guarantees a fair trial, *Fay v. New York*, *supra*, and cases there cited, and a fair trial envisions a jury list which

reflects a fair cross-section of the community. *Brown v. Allen, supra.* Having these authorities in mind, I have no difficulty in concluding that the appellants have standing to complain of the wage earner class exclusion.

Having joined in the reversal, it may be well to add that little is apt to come of new indictments. The crime was committed in 1950; appellants were tried in 1953; and it is likely that adequate proof would be forthcoming under the facts of this case for conviction at this last date. The Supreme Court was of this view in 1955. See *Michel v. Louisiana, supra.* This is an example of a near breakdown in our system of criminal justice brought about by a defect in the jury process, and long delays in the appellate process through the indulgence of the piecemeal appeal approach.[1] Persons charged with grave crimes may go free. Society will be the loser. Paraphrasing the famous dictum of Justice Cardoza in *People v. DeFore*, 1926, 242 N.Y. 13, 150 N.E. 585, the criminals may go free because the courts have blundered.

It may be that administration of criminal justice now exceeds the capacity of our court system. There is no doubt that the administration of the jury system presently exceeds the capacity of the court system.

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[1] As examples of unusual delay, see the following cases heard en banc along with this case: *Scott v. Walker*, No. 20,814, appellant sentenced to death in 1958 for rape; *Brooks v. Beto*, No. 22,809, appellant sentenced to fifty years in 1959 for rape; *United States of America ex rel. Edward Davis v. Davis, Governor*, No. 21,976, sentence of death in 1959 for the murder of a police officer.

Our en banc decisions in this case and in *Rabinowitz v. United States*, 5 Cir., 1966, ... F.2d ...., and *Brooks v. Beto*, 5 Cir., 1966, ... F.2d ...., make this clear. I do not think it an excessive statement to say at this sitting that it is unlikely that there is a jury commission or trial court, state or federal, in this circuit which possesses the prescience to compile a jury list immune from successful attack on either racial or fair community cross-section grounds through the use of a mathematical approach. What may appear as a proscribed imbalance can be easily shown by using percentages. And, of course the decisional process is much simpler where we apply only a mathematical test, but a mathematical straight jacket instead of balanced reasoning on all the relevant facts, has not been the way or the strength of the law. *Swain v. State of Alabama, supra,* is a fair and common-sense approach to the jury problem and I think it unfortunate that a lower court departs, as the majority does here on the race question, from the sound view there expressed.

Moreover, it is imperative that the court adopt some new approach to make certain that all possible errors are asserted in the first instance to avoid piecemeal appeals and the resultant interminable delays. The courts may have to adopt a *parens patriae* approach as guardians of the court system to make certain that possible errors are not held out for future use.

COLEMAN, Circuit Judge:

I join in the specially concurring opinion of Judge Bell.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

(328)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 22218

EDGAR LABAT
and
CLIFTON ALTON PORET,

Appellants,

v.

ROBERT B. BENNETT, Acting Warden,
Louisiana State Penitentiary,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(September 30, 1966)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, and COLEMAN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above captioned and numbered cause is hereby DENIED.

APPENDIX C
JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1965

NO. 22218

D. C. Docket No. 550—Miscellaneous

EDGAR LABAT and CLIFTON ALTON PORET,
Appellants,

versus

ROBERT B. BENNETT, Acting Warden,
Louisiana State Penitentiary,
Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before TUTTLE, Chief Judge, BROWN, WISDOM, GEWIN, BELL, THORNBERRY, and COLEMAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby remanded to the said District Court with directions to issue the writ releasing the petitioners from custody on their present convictions and sentences, subject, of course, to reindictment and to retrial by the State;

It is further ordered and adjudged that the appellee, Robert B. Bennett, Acting Warden, Louisiana State Penitentiary, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

August 15, 1966

Court Costs payable to Clerk,
U. S. Court of Appeals:
Docketing cause, etc. ____$25.00

GEWIN, Circuit Judge, dissents.

BELL, Circuit Judge, concurs in the result.

COLEMAN, Circuit Judge, joins in the specially concurring opinion of Judge Bell.

Issued as Mandate: Oct. 10, 1966.